80-622

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLER

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

PAUL AJLOUNY,

Petitioner

-against-

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does the exclusionary rule apply to protect and enforce a United States citizen's Constitutional rights against unlawful electronic surveillance conducted without a warrant in the name of foreign intelligence, which surveillance the Second Ciruit assumed *arguendo*—without passing on the issue--to be "unlawful"?

2. Is the purpose and scope of the "border search" exception to the Fourth Amendment limited to travelers and goods *entering* the country as articulated in this Court's decisions, or does it expand to countenance searches without any probable cause or warrant of United States citizens and their property leaving the country--where the people and property were lawfully in the country and had not crossed any border at the

time of the search?

3. Does Section 2314's prohibition against transporting stolen property in interstate or foreign commerce extend to property transported intrastate from Hempstead, New York, to Brooklyn, New York, where the language, legislative history and all prior judicial interpretations of this statute and three related federal criminal "transportation" statutes require transportation across a state or national boundary line?

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IN THE SUPREME COURT OF THE UNITED STATES

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PAUL AJLOUNY,

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

Paul Ajlouny, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this criminal case on August 29, 1980.

Opinions of the Courts Below

The opinion of the United States Court of Appeals for the Second Circuit sought to be reviewed is reproduced in Appendix A and is not yet officially reported. The opinion of the United States District Court for the Eastern District of New York (Costantino, D.J.) is reproduced in Appendix B and is published at 476 F.Supp. 995.

Jurisdiction of the Supreme Court

The judgment of the United States Court of Appeals for the Second Circuit was entered on August 29, 1980. The jurisdiction of this Court is invoked under Section 1254(1) of Title 28, United States Code, and Rule 17 of the Rules of this Court, to review by writ of certiorari the judgment of the United States Court of Appeals for the Second Circuit.

Constitutional Provisions and Statutes

CONSTITUTION: Fourth Amendment
STATUTE: 18 United States Code Section 2314

Each of the above is set forth in Appendix E.

Statement of the Case

The United States Court of Appeals for the Second Circuit, in the context of affirming petitioner's conviction, announced new and drastically expansive interpretations of constitutional and statutory law. In a radical departure from prior law, the Second Circuit held that the exclusionary rule would not apply to protect fundamental Fourth Amendment rights of United States citizens against unlawful electronic surveillance--allegedly seeking foreign intelligence. Without passing on the issue, the Second Circuit assumed, arguendo, that such warrantless

electronic surveillance would be illegal. The exclusionary rule is the fundamental remedy fashioned by this Court to protect all citizens against invasion of Fourth Amendment rights and its application is essential in cases involving illegal electronic surveillance, which is perhaps the most invidious and inherently intrusive of all Fourth Amendment violations.

The Second Circuit proclaimed an additional encroachment upon Fourth Amendment safeguards by expanding the so-called "border search" exception to include exit as well as entrance searches. This Court has often ruled that border searches without any warrant or probable cause were a reasonable exception to Fourth Amendment requirements "because of national self-protection reasonably requiring one entering

the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." Carroll v. United States, 267 U.S. 132, 154 (1925) (emphasis added). By expanding this exception to persons and goods ("lawfully within the country") traveling out of the country, the Second Circuit substantially enlarges the government's ability to ignore basic Fourth Amendment standards which--at any other time--guarantee an individual or his property freedom from warrantless searches without probable cause.

Petitioner was convicted for violating Section 2314 of Title 18, U.S.C., which prohibits the transportation of stolen property in interstate or foreign commerce--despite the fact that the property in question was not

transported across a state or national boundary line. In an unprecedented ruling, the Second Circuit expanded the statute to include what was an undisputed intrastate transportation from Hempstead, New York, to a Brooklyn pier, thereby rejecting uniform authority in other circuits holding that purely intrastate transportation of stolen property will not support a conviction under this statute.

Statement of Essential Facts

Petitioner was charged with transporting stolen property in foreign commerce in April 1978 when he was a Vice-President of the Kinney Mechanical Maintenance Division of the National Kinney Corporation for whom he had worked for approximately 10 years. The alleged stolen property in question constituted certain telephone and teletype equipment

that had been packed with numerous other items in a cargo container that petitioner intended to ship to the small Persian Gulf country of Qatar where he was about to start a new business pursuant to a joint venture agreement with the National Kinney Corporation.

In March 1978, several United States Customs Agents departed from their traditional duties and became involved in assisting the New York Telephone Company investigate "blue box" use on petitioner's home telephone. In the course of this investigation, the agents observed petitioner's cargo container being loaded in a public shopping center near petitioner's Hempstead residence. On April 10, the Customs Agent in charge decided to search the container. On April 14, the container was moved by truck from the Hempstead shopping center

to a Brooklyn pier.

On April 17, 1978, Customs Agents broke into the container, cutting the metal seal with which it was locked, and proceeded during the next few hours to search and remove the entire contents of the container. Although only the telephone and teletype equipment was alleged to be stolen, the agents also seized and held for three months the great bulk of the container's contents including books, tools, golf clubs, suitcases, clothing, industrial cleaning equipment, and numerous other items.

The government conceded that the search was conducted without a warrant or any probable cause. The Customs Agent in charge testified that the search was based on "nothing concrete, but...a suspicion we would find munitions in that container," and, of course, the search revealed no munitions.

The key issues at trial were whether the property was stolen and whether petitioner knew it was stolen. The government did not call any witness to claim ownership of 75% of the allegedly stolen property and there was no direct evidence that any of the materials were in fact stolen. On the issue of knowledge, the petitioner proved that his container, with all this property, was broken into by an unknown individual the night before it was scheduled to go to the pier. It was undisputed that petitioner immediately reported that fact to the local police and requested that they come to the scene of the container to investigate--a reaction highly inconsistent with any knowledge or belief that the container held stolen property.

The jury deliberated for approximately 20 hours before returning a guilty verdict. Petitioner was subsequently sentenced to a two-year term of imprisonment and a $10,000 fine.

Prior to trial, the government acknowledged that the FBI had conducted multiple warrantless electronic surveillances of petitioner's conversations before, during and after the criminal activities charged in the indictment. The government claimed that these surveillances were foreign intelligence national security surveillances and submitted records of these surveillances in camera to the District Court. Petitioner's pre-trial motion to discover and suppress evidence derived from these warrantless electronic surveillances was denied by Judge Costantino in a written opinion (Appendix B). A pre-

trial motion to suppress the property at issue on the ground that the warrantless search of petitioner's container--absent probable cause--violated Fourth Amendment guarantees, was also denied by Judge Costantino in a written opinion (Appendix B).

At the close of the government's case (and again at the close of the defense case and after the verdict), Petitioner moved for a judgment of acquittal on the ground that the prosecution had failed to prove that the goods were transported in foreign commerce as required by Section 2314, in that it was undisputed that the goods had not crossed a state or national boundary line. Judge Costantino denied this motion relying on cases interpreting different language in a different statute, Section 659 of Title 18, U.S.C.

(Appendix C).

On appeal to the United States Court of Appeals for the Second Circuit, petitioner contended that the warrantless electronic surveillances were unconstitutional and that the failure to disclose the fruits and other information concerning such surveillances warranted reversal. The Second Circuit avoided deciding the legality of the warrantless foreign intelligence electronic surveillance by assuming, arguendo, that the electronic surveillances of petitioner's conversations were unlawful and ruling that the exclusionary rule would not apply (Appendix A). Petitioner also argued on appeal that the container search violated fundamental Fourth Amendment rights. The Second Circuit rejected his contention by extending the "border search" exception to sanction export

searches--without any probable cause or a warrant--of people and property leaving the country (Appendix A). Petitioner also renewed his claim on appeal that the intrastate transportation of the property in question from Hempstead, New York, to a Brooklyn pier did not suffice to violate the prohibition of Section 2314 against transportation of stolen property in interstate or foreign commerce. Here again, the Second Circuit, in the face of uniform authority to the contrary, expanded the law by ruling that intrastate transportation to a pier, of property designated for shipment abroad, constitutes transportation in foreign commerce under Section 2314 (Appendix A).

Reasons For Granting The Writ

POINT I

The Second Circuit's Unprecedented Decision That The Exclusionary Rule Does Not Apply To Protect Petitioner's Fourth Amendment Rights Against Unlawful Electronic Surveillance Is In Direct Conflict With Prior Decisions Of This Court

The government acknowledged in the District Court that petitioner's conversations had been overheard by the FBI during the course of so-called "foreign intelligence national security" electronic surveillances. Records submitted to the District Court in January and May, 1979 indicated that petitioner was the subject of multiple electronic surveillances before, during and after the activity in April 1978 for which he stands convicted. The Second Circuit's unique and unprecedented decision assumed, arguendo, that the surveillances were "unlawful and did lead to...trial evidence" but held that it would not "be

appropriate to apply the exclusionary rule" in those circumstances. (18a-19a) In so holding, the Second Circuit avoided deciding the legality of electronic surveillances conducted without a judicial warrant in the name of "foreign intelligence", an issue which was left undecided by this Court in United States v. United States District Court ("Keith"), 407 U.S. 297 (1972).

The applicability of the exclusionary rule to protect against unconstitutional invasion of privacy through illegal electronic surveillance was clearly stated by this Court in Alderman v. United States, 394 U.S. 165, 171 (1969):

> "The exclusionary rule fashioned in Weeks v. United States, 232 U.S. 383 (1914), and Mapp v. Ohio, 367 U.S. 643 (1961), excludes from a criminal trial any evidence seized from the defendant in violation of his Fourth Amendment rights. Fruits of

> such evidence are excluded as well. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391-392 (1920). Because the Amendment now affords protection against the uninvited ear, oral statements, if illegally overheard, and their fruits are also subject to suppression. Silverman v. United States, 365 U.S. 505 (1961); Katz v. United States, 389 U.S. 347 (1967).

In Alderman this Court confirmed "the existing rule that unlawful wiretapping or eavesdropping whether deliberate or negligent, can produce nothing usable against the person aggrieved by the invasion" (394 U.S. at 176), by holding, inter alia, (1) that all illegally obtained surveillance records as to which a defendant has standing--including national security information--must be submitted to the defendant or his counsel and (2) that the defendant is entitled to suppression or exclusion from his trial of such illegally obtained information and its fruits. The Court

also noted:

> "It may be that the prospect of disclosure will compel the Government to dismiss some prosecutions in deference to national security or third party interests. But this is a choice the Government concededly faces with respect to material it has obtained illegally...." (394 U.S. at 184).

The Second Circuit's rejection of the exclusionary rule in an electronic surveillance case involving inherently intrusive violations of Fourth Amendment privacy rights runs directly contrary to well established constitutional law articulated in this Court's decisions. See United States v. United States District Court ("Keith"), 407 U.S. 297 (1972); Katz v. United States, 389 U.S. 347 (1967); United States v. Silverman, 365 U.S. 505 (1961); Nardone v. United States, 308 U.S. 338 (1939). All of these decisions directly or indirectly

implemented the exclusionary rule in situations involving illegal electronic surveillance. The reasoning is fundamental. The exclusionary rule was a judicially created means of effectuating constitutional rights. Stone v. Powell, 428 U.S. 465, 482 (1976); Gouled v. United States, 255 U.S. 298 (1921); Weeks v. United States, 232 U.S. 383 (1914); Boyd v. United States, 116 U.S. 616 (1886). In order to secure the fundamental guarantees of the sanctity of the home and the inviolability of the person, for over sixty years this Court has held that evidence seized during an unlawful search may not constitute proof against the victim of the search.

> "It is...imperative to have a practical procedure by which courts can review alleged violations of constitutional rights and articulate the meaning of those rights. The advantage of the exclusionary rule--entirely apart from any

> direct deterrent effect--is that it provides an occasion for judicial review, and it gives credibility to constitutional guarantees. By demonstrating the society will attach serious consequences to the violation of constitutional rights, the exclusionary rule invokes and magnifies the moral and educative force of the law. Over the long term this may integrate some fourth amendment ideals into the value system or norms of behavior of law enforcement agencies."

Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 756 (1970). In Stone v. Powell, supra at 493, this Court "adhere[d] to the view that these considerations support the implementation of the exclusionary rule at trial and on direct appeal....".

The Second Circuit's unique ruling is based on the assumption that traditional justifications for the exclusionary rule--deterrence of conduct which

violates Fourth Amendment rights and the imperative of judicial integrity--would not be served in this case if one accepts the further assumption that the government agents involved in these electronic surveillances were acting in the good faith belief that their conduct was in accordance with the law. These assumptions are factually and legally unsound. Similar claims were specifically rejected in Katz v. United States, supra, where the government urged this Court to retroactively validate the conduct of its agents because they "relied upon the [prior Supreme Court] decisions in Olmstead and Goldman." This Court's response there is equally applicable here.

> "It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer....

> Searches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause,' ... for the Constitution requires 'that the deliberate impartial judgment of a judicial officer... be interposed between the citizen and the police....' Wong Sun v. United States, 371 U.S. 471, 481-482. 'Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes,'...and that searches conducted outside the judicial process without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions." Katz v. United States, supra at 356-57.

See also Almeida-Sanchez v. United States, 413 U.S. 266 (1973), where the fact that the government agents conduct was expressly authorized by a federal statute permitting warrantless automobile searches within a reasonable distance from a United States boundary did not deter this Court from reversing a

conviction based on the fruits of that warrantless search.

In contending that the exclusionary rule's deterrent purpose would not be served in the instant case, the Second Circuit assumed that FBI electronic surveillances of petitioner were made in the good faith belief that this conduct was lawful (20a-21a). This assumption is erroneous and--unlike the "good faith" ruling in United States v. Williams, 622 F.2d 830 (5th Cir. 1980)--unsupported by any hard facts, inasmuch as petitioner was denied a hearing and any discovery of information relating to the initiation, purpose, duration, necessity, legitimacy and reasonableness of these multiple electronic surveillances.

The Second Circuit points to the fact that at the time of these electronic surveillances neither the federal

statutes nor the case law in its Circuit* supported petitioner's argument on appeal that a warrant was required for foreign intelligence electronic surveillances. However, in the District of Columbia Circuit where, according to government submissions, the decisions were made to institute these electronic surveillances, two courts in dicta have concluded that the Executive's powers in the field of foreign affairs do not justify warrantless surveillance for foreign affairs purposes. Zweibon v. Mitchell, 516 F.2d 594, 651 (D.C. Cir. 1975) (en banc), cert. denied, 425 U.S. 944 (1976); Berlin Democratic Club v. Rumsfeld, 410 F. Supp.

* Actually, as noted in its opinion, neither the Second Circuit nor any district courts in the circuit had decided whether warrantless foreign intelligence electronic surveillances were legal or not.

114 (D.D.C. 1976). In Zweibon, the government sought to justify warrantless surveillances in foreign affairs by pointing to the Executive's recognized responsibility for the administration of this country's foreign affairs. However, as the Zweibon court noted in a well reasoned opinion,

> "the precedents of Executive practice and judicial decisions merely substantiate the existence of those powers and legitimate the authority of the President to obtain information necessary to protect the national security from foreign aggression; they do not preordain the procedures with which the President must comply in exercising that authority." Zweibon v. Mitchell, supra, 516 F.2d at 616 (emphasis added).

The Zweibon Court found that claims of lack of judicial competence, danger of security leaks, the fact that such surveillance is for the purpose of gathering intelligence rather than for investigating criminal conduct, the delay

caused by the necessity of applying for a warrant and the general administrative burden (many of the justifications which the Keith Court rejected as reasons for permitting warrantless national security domestic surveillance, Keith, supra, 407 U.S. at 318-321) were insufficient to "dictate abrogation of the warrant requirement for that category of cases in which surveillance is based upon the President's constitutional powers with respect to the conduct of foreign affairs ...",

> "Indeed, our analysis would suggest that, absent exigent circumstances, no wiretapping in the area of foreign affairs, should be exempt from prior judicial scrutiny, irrespective of the justification for the surveillance or the importance of the information sought." Id. at 651.

Following this Court's decision in Keith in 1972, there was certainly no imprimateur of legality surrounding

warrantless electronic surveillances in the foreign intelligence area, despite the fact that the Court did not specifically rule on that issue. In fact, efforts began in Congress in 1972 to enact legislation that would expressly curtail warrantless electronic surveillance in the name of national security. Those efforts culminated in the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§1801-1811 (Supp. II 1978), which, according to the Second Circuit, would have required a court order for the surveillances of petitioner (22a-23a). The concern that such foreign intelligence electronic surveillances were definitely illegal was announced in a Senate Judiciary Committee Report in November, 1977, well before the FBI conducted electronic surveillances of petitioner's conversations during the period when the

alleged criminal activity was in progress.

> "The need for such statutory safeguards has become apparent in recent years. This legislation is in large measure a response to the revelations that warrantless electronic surveillance in the name of national security has been seriously abused. These abuses were initially illuminated in 1973 during the investigation of the Watergate break-in. Since that time, however, the Senate Select Committee to Study Government Operations with Respect to Intelligence Activities, chaired by Senator Church (hereafter referred to as the Church Committee), has concluded that every President since Franklin D. Roosevelt asserted the authority to authorize warrantless electronic surveillance and exercise that authority. While the number of illegal or improper national security taps and bugs conducted during the Nixon administration may have exceeded those in previous administrations, the surveillances were regrettably by no means atypical. In summarizing its conclusion that surveillance was 'often conducted by illegal or improper means,' the Church committee wrote:
>
> 'Since the 1930's,

> intelligence agencies have frequently wiretapped and bugged American citizens without the benefit of judicial warrant....[P]ast subjects of these surveillances have included a United States Congressman, Congressional staff member, journalists and newsmen, and numerous individuals and groups who engaged in no criminal activity and who posed no genuine threat to the national security, such as two White House domestic affairs advisers and an anti-Vietnam War protest group. (vol. 2, p. 12)

* * * *

> The application of vague and elastic standards for wiretapping and bugging has resulted in electronic surveillances which, by any objective measure, were improper and seriously infringed the Fourth Amendment Rights of both the targets and those with whom the targets communicated. The inherently intrusive nature of electronic surveillance, moreover, has enabled the Government to generate vast amounts of information--unrelated to any legitimate government interest--about the personal and political lives of American citizens.

> The collection of this type of information has, in turn, raised the danger of its use for partisan political and other improper ends by senior administration officials. (vol. 3, p. 32)."

Senate Report (Judiciary Committee) No. 95-604, Nov. 15, 22 1977, p. 7, 8; 4 U.S. Cong. & Adm. News at 3908-09 (1978).

In considering the government's good faith with respect to electronic surveillances of petitioner, it also would be relevant to note the government's apparent violation of Section 2-201(b) of Executive Order No. 12036, effective January 24, 1978, which prohibited warrantless electronic surveillance of a United States citizen "unless the President has authorized the type of activity involved....". Government submissions in this case are devoid of any reference to Presidential authorization of the electronic surveillance at

issue which extended well past January 1978.

In fact, the Second Circuit is probably incorrect in concluding that the surveillances of petitioner only occurred prior to the October 1978 effective date of the Foreign Intelligence Act and, therefore, were not subject to this Act. Immediately prior to the trial, which took place during October and November 1979, petitioner's counsel--making specific reference to the new Act--requested that the government file with the District Court any information relating to electronic surveillance of petitioner from September 5, 1978 (the date of indictment and the latest date covered by prior submissions) up through the trial which concluded on November 28, 1979. On that day, October 22, 1979, government counsel consented to that

request stating "we will make the request for an all-agency check which will be conducted during the trial" and the District Court specifically ordered that this be done. For almost one year the government has avoided complying with this Court order, despite specific requests by petitioner's counsel prior to the filing of the brief and record on appeal and prior to the filing of this petition. The assumption that the electronic surveillances of petitioner--admittedly conducted during a five year period from 1972 to September 1978--continued up through the trial and even to this date is clearly reasonable if not inevitable. The reasons for the government's deliberate disregard of a Court order requiring disclosure of the existence of such continuing surveillances is eloquent testimony to the absence of governmental "good faith" and to the

essential need for deterrence of these constitutional violations through application of the exclusionary rule.

The Second Circuit's argument that good faith eliminates the need for any deterrence that might be achieved by the exclusionary rule, conflicts sharply with a recent decision by the Sixth Circuit, United States v. Clark Bailey and Gomez, slip op. (July 31, 1980):

> "The Government argues further that suppression is an inappropriate remedy because the Government acted without deliberate intention to violate the law. However, the fourth amendment requires more than good faith; it requires observance of procedures designed to ensure that the search or seizure authorized by the warrant is reasonable.
>
> "We think electronic surveillance has such a potential for abuse that the Government must be held accountable for its use. To hold the exclusionary rule inapplicable under the facts of this case would place fourth amendment protections solely under the control of the Executive Department of the Government and

> would constitute judicial abdication. Accordingly, we hold that the application of the exclusionary rule by the district court in the present case was correct."

Good faith on the part of law enforcement agents should never be the test in determining either the reasonableness of a particular search and seizure or the applicability of the exclusionary rule. See, Beck v. Ohio, 379 U.S. 89, 98 (1964); Terry v. Ohio, 392 U.S. 1, 21-22 (1968); Henry v. United States, 361 U.S. 98, 101 (1959). As this Court noted in Beck

> "If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate and people would be 'secure in their persons, houses, papers and effects' only in the discretion of the police." 379 U.S. at 97.

Mr. Justice Marshall's dissenting opinion in United States v. Caceres, 440 U.S. 741, 766 (1979) illuminates the problem in utilizing any good faith test;

> "Restricting application of the exclusionary rule to instances of bad faith would invite law enforcement officials to gamble that courts would grant absolution for all but the most egregious conduct. Since judges do not lightly cast aspersions on the motives of government officials, the suppression doctrine would be relegated to those instances where a litigant could prove insolent or calculated indifference to ... regulation."

Certiorari should be granted to review the Second Circuit's refusal to follow Supreme Court law on this important constitutional issue.

POINT II

The Second Circuit's Extension Of The "Border Search" Exception To Export Searches, Conflicts With Decisions Of This Court And Other Courts Which Recognize The Purpose And Scope Of The Border Exception Is Limited To Travelers And Goods "Entering The Country"

In a new encroachment upon Fourth Amendment rights the Second Circuit held that "export searches" of persons and property leaving the country may be conducted without a warrant or any probable cause pursuant to the so-called "border search" exception to the Fourth Amendment. This ruling ignores and conflicts with numerous decisions of this Court which establish that the "border search" exception was designed for, and applies to, import searches only--that is, searches of persons and property entering the country--in order to enforce customs, immigration and

narcotics laws. In Torres v. The Commonwealth of Puerto Rico, 442 U.S. 465, 472-473 (1979), this Court held that a Puerto Rican statute authorizing airport searches without probable cause was unconstitutional and not within the "border search" exception where the traveler had flown from Miami to Puerto Rico.

> "Public Law 22 cannot be justified by any analogy to customs searches and a functional equivalent of the international border of the United States. The authority of the United States to search the baggage of arriving international travelers is based on its inherent sovereign authority to protect its territorial integrity. By reason of that authority it is entitled to require that whoever seeks entry must establish the right to enter and to bring into the country whatever he may carry." (emphasis added)

In United States v. Ramsey, 431 U.S. 606 (1977), this Court traced the history of the border search exception

in some detail reaffirming the incontrovertible fact that the exception was based on "the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country...." 431 U.S. at 616 (emphasis added) The Court noted that the "border search exception is grounded in the recognized rights of the sovereign to control, subject to substantive limitations imposed by the Constitution, who and what may enter the country." 431 U.S. 606, 620 (emphasis added) After observing that the same Congress which enacted the bill of rights also passed the first statute giving customs officers the right to conduct inspections "after entry" on the basis of mere suspicion, the Court went on to explain that:

> "Border searches, then from before the adoption of the

> Fourth Amendment, have been considered to be 'reasonable' by the single fact that the person or item in question had entered into our country from outside." Id. at 619 (emphasis added)

In United States v. Thirty-Seven Photographs, 402 U.S. 363, 376 (1971), this Court observed: "Customs officials characteristically inspect luggage and their power to do so is not questioned in this case; it is an old practice and is intimately associated with excluding illegal articles from the country." (emphasis added). This Court's decision in Carroll v. United States, 267 U.S. 132, 154 (1925) is equally definitive on the purpose and limits of the "border search" exception*:

> "Travelers may be so stopped

* See also, Alexander v. United States, 362 F.2d 379, 382 (9th Cir.), cert. denied, 385 U.S. 977 (1966) ("the primordial purpose of a [border] search by Customs officers is not to apprehend

> in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country...have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise." (emphasis added)

Thus, under the Second Circuit's ruling, Fourth Amendment protections available to a citizen whose goods are loaded on a Brooklyn pier for shipment to Baltimore will not safeguard that same citizen if

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fn. cont'd.

persons, but to seize contraband property unlawfully imported or brought into the United States"); Klein v. United States, 472 F.2d 847, 849 (9th Cir. 1973) ("The primary purpose [of a border search] is to ascertain if merchandise brought into this country is subject to duty or has been unlawfully imported.")

the same goods are loaded on the same pier for shipment to France, despite the fact that both citizen and goods are "lawfully within the country". There is no reasonable basis for such discrimination and it clearly is not warranted by the reasons underlying the original border search exception.

Other authorities make it equally clear that the so-called "border search" exception was defined for and applies to import searches only. "[B]order searches for contraband are only searches for illegal imports. Any search for illicitly exported property can be initiated only on probable cause." Note, From Bags to Body Cavities: The Law of Border Search, 74 Colum. L. Rev. 53 fn.2 (1974) (emphasis added). In United States v. Marti, 321 F. Supp. 59, 63-64 (E.D.N.Y. 1970), Judge Weinstein

specifically held that "probable cause for the exit search is required", noting that "the relevant statutes authorize such searches only where probable cause is found to exist." In Corngold v. United States, 367 F.2d 1, 3 (9th Cir. 1966), the Court invalidated a warrantless airport search of packages, ruling that the "border search" exception was not applicable because "there is nothing in the record to suggest that the search of appellant's packages occurred in the course of entry into this country" (emphasis added). Similarly, the New York Court of Appeals in People v. Esposito, 37 N.Y.2d 156, 160 (1975), held that the border search exception was inapplicable to a search of baggage leaving the country.

> "[T]he border search exception to the requirement of probable cause ... is a limited power. Its purpose is to permit such

> officials to search for contraband coming into the country without payment of duty or in contravention of statutory prohibitions. It does not extend to searches of baggage going out of the country upon which no duty is payable and on which no prohibitions are placed."

In fact, the statute authorizing seizure of illegally exported munitions--the sole object of the customs search here--specifically requires probable cause. 22 U.S.C. §401(a).

The Second Circuit observed that the applicability of the border search exception to export searches was an "open question" until recently when it was purportedly resolved by California Bankers Ass'n. v. Shultz, 416 U.S. 21, 63 (1974), where this Court in upholding the reporting requirements of the Bank Secrecy Act applicable to foreign financial dealings, noted that:

> "If reporting of income may

> be required as an aid to enforcement of the federal revenue statutes, and if those entering and leaving the country may be examined as to their belongings and effects, all without violating the Fourth Amendment, we see no reason to violate the Secretary's regulations here." (emphasis added)

The underscored comment is apparently a carelessly phrased reference to a quotation from Carroll v. United States cited in the preceding paragraph of the opinion. The particular quotation--discussed supra at 38--limits the border search exception to persons and goods "entering the country." Although conceding the California Bankers statement "is dictum," the Second Circuit contends that in an earlier decision, United States v. Swarovski, 592 F.2d 131, 133 (2d Cir. 1979), "this Circuit relied on the Supreme Court's statement to hold squarely that the border search exception applies to items leaving as well as

entering the country." (6a)

The underlying facts in Swarovski do not comport with this description because in that case the sufficiency of probable cause was conceded by all parties and Swarovski's basic claim was that the customs agents had probable cause sufficiently in advance of the search to necessitate obtaining a warrant.* The government argued that probable cause did

* See Appellant Swarovski's Brief, p. 18 ("It is undisputed that the agents had probable cause...as early as two weeks before his arrest.") and Judge Pratt's decision set forth in Appellant Swarovski's Appendix, pp. A35-A86: "In short, although warrantless, Fish's seizure and search of Swarovski's bags in the baggage area of JFK Airport on April 2, 1976 was valid and reasonable search and seizure under the authority granted by 22 U.S.C. §401, based as it was on probable cause to believe that the bags contained a special purpose military camera about to be exported in violation of federal law." Id. at A61-62 (emphasis added).

not arise until just before the search when there was no time to get a warrant and, even if probable cause existed at an earlier stage, "exigent circumstances were ... present justifying the search without a warrant." (Appellee's Brief, p.31) The Second Circuit's brief discussion of this point is clearly limited to the particular issue presented there, i.e., the warrantless aspect of an otherwise valid search. 592 F.2d at 133.

> "The warrantless searches of appellant's luggage as he was about to depart the country did not violate his Fourth Amendment rights. See, United States v. Asbury, slip op. 5137, 5140 (2d Cir. Nov. 30, 1978). Appellant's contention that customs officials can make such a search only when the person whose effects are being searched is entering the United States is not the law. See 22 U.S.C. §401(a); California Bankers Ass'n. v. Shultz, 416 U.S. 21, 63 (1974); United States v. Chabot, 193 F.2d 287, 290 (2d Cir. 1951); United States v. Stanley, 545 F.2d 661, 667 (9th Cir. 1976),

cert. denied, 436 U.S. 917 (1978); Samora v. United States, 406 F.2d 1095, 1098-99 (5th Cir. 1969)."

Asbury involved the warrantless strip search of an individual entering the country. The statute immediately cited for the proposition that "custom officials can make such a [warrantless] search", §22 U.S.C. §401(a), expressly requires probable cause. Chabot and Samora were cases in which probable cause was present and the absence of a warrant was the issue.*

Stanley was and is the sole authority supporting the Second Circuit's ruling in the instant case, and

* In Chabot, this Court relied on the same Section 401, which permits warrantless searches where a probable cause standard is met.

the erroneous reasoning of that decision has been effectively detailed by one critical commentator. Recent Development: Criminal Law-Border Searches, 65 Geo. L.J. 1641, 1649-50 (1977). In Stanley, the Ninth Circuit acknowledged that its application of the border search exception to an outgoing vessel was an unprecedented expansion of existing law. However, Stanley recognized that an actual border crossing--totally lacking in the instant case--was a prerequisite for any application of the border search exception. United States v. Stanley, 545 F.2d 661, 666 (9th Cir. 1976), cert. denied, 436 U.S. 917 (1978); see United States v. Cadena, 585 F.2d 1252, 1262, fn. 21 (5th Cir. 1978); United States v. Ingham, 502 F.2d 1287 (5th Cir. 1974), cert. denied, 421 U.S. 911 (1975).

POINT III

The Second Circuit's Expansion Of Section 2314's Application To Intrastate Shipments Is Without Precedent And Conflicts With Its Own Prior Decisions, Rulings Of Other Federal Courts And Congressional Intent As Construed By This Court

Petitioner was convicted for violating Section 2314 which prohibits the transportation of stolen property in interstate or foreign commerce (Appendix E). The undisputed evidence at trial showed only intrastate transportation--from Hempstead, New York, to a Brooklyn pier--of the property in question. Prior to the Second Circuit's opinion in this case, it was settled law that purely intrastate transportation of stolen property would not support a conviction under Section 2314. See United States v. Walker, 575 F.2d 209, 214-15 (9th Cir. 1978), cert. denied, 439 U.S. 931 (1978) ("Transportation solely within the state

of Hawaii is not interstate or foreign commerce under this definition."); United States v. Poole, 557 F.2d 531, 534-536 (5th Cir. 1977) (§2314 conviction for interstate transportation of a fraudulently obtained security overturned because no proof that security crossed state line; United States v. Hilyar, 543 F.2d 41 (8th Cir. 1976) (guilty plea vacated because insufficient showing that security traveled interstate in forged condition); United States v. Owens, 460 F.2d 467, 469-71 (5th Cir. 1972) (§2314 conviction reversed where no proof that instrument traveled across state line in forged condition); United States v. Levy, 579 F.2d 1332, 1335-38 (5th Cir. 1978), cert. denied, 440 U.S. 920 (1979); United States v. Scandifia, 390 F.2d 244, 250 (2d Cir. 1968), remanded on other grounds, sub nom. Giordano v. United States, 394 U.S.

310 (1969); United States v. Walker, 176 F.2d 564, 566 (2d Cir.), cert. denied, 338 U.S. 891 (1949). See also United States v. Bottone, 365 F.2d 389, 393 (2d Cir.), cert. denied, 385 U.S. 974 (1966), where in disposing of a claim that xerox copies were not stolen property, Judge Friendly made it clear that Section 2314 required the crossing of a state or national boundary line. "The statute would not extend to the case where a ... secret formula was memorized, carried away in the recesses of a thievish mind and placed in writing only after a boundary had been crossed." (emphasis added).

The language, legislative history and judicial interpretation of Section 2314 uniformly restrict its application to persons who transport stolen property across a state or national boundary line.

In United States v. Squires, 581 F.2d 408, 411 (4th Cir. 1978), the Fourth Circuit was quite clear on this point.

> "A person transforms a state offense into a violation of 2314 by transporting counterfeit securities in interstate or foreign commerce. Interstate or foreign transportation within the meaning of 18 U.S.C.A. Section 2314 can be proved by either of two means: First, the government can prove that a defendant actually transported a counterfeit security from one state or one country to another state or country. Second, the government can prove that a defendant caused a counterfeit security to be transported from one state or country to another through the negotiation process." (emphasis added)

This comports precisely with the language and legislative history of this statute. Section 2314 provides, in pertinent part:

> "Whoever transports in interstate or foreign commerce any goods ... of the value of $5,000 or more, knowing the same to have been stolen..."

commits a federal offense. The definition of interstate and foreign commerce

applicable to Section 2314 is set forth in 18 U.S.C., Section 10.

> "The term 'interstate commerce' as used in this Title, includes commerce between one state, territory, possession or the District of Columbia and another state, territory, possession or the District of Columbia. The term 'foreign commerce', as used in this Title, includes commerce with a foreign country."

Without a single supporting precedent and in the face of overwhelming contrary authority, the Second Circuit ruled that petitioner's intrastate transportation of property was "sufficiently in 'foreign commerce' for purposes of §2314" because the property was bound for a foreign destination and had arrived at a pier which a customs agent described as a "customs area". The Second Circuit grounded its novel ruling on the theory that "the Commerce Clause permits Congress to reach stolen goods at such a location, and we see no reason to doubt that Congress intended to

do so." See Appendix A at 13a. Without disputing the reach of the Commerce Clause, it seems clear that the language and legislative history of this statute do not support the Second Circuit's bare speculation about Congressional intent.

Sections 2314 and 10 are derived from the National Stolen Property Act ("NSPA") of May 22, 1934, Sections 3 and 2(a), respectively, which sections were subsequently codified as Sections 415 and 414(a) of Title 18, U.S.C. (1940 ed.). The National Stolen Property Act was enacted to deal with increasing interstate crime and the problem of criminals who were able to evade prosecution by moving across state lines beyond the reach of prosecutors in the state where the theft occurred. As this Court recognized in United States v. Sheridan, 329 U.S. 379, 384 (1946), Congress

enacted this law to aid the states "in detecting and punishing criminals whose offenses are complete under state law, but who utilize the channels of interstate commerce to make a successful getaway and thus makes the state's detecting and punitive processes impotent." Section 2(a) of NSPA clearly manifested Congressional intent to reach only those criminal schemes where stolen goods were transported across state or national boundary lines by its express terms.

> "The term 'interstate or foreign commerce' shall mean transportation from one State, Territory, or the District of Columbia to another State, Territory, or the District of Columbia or to a foreign country or from a foreign country to any State, Territory, or the District of Columbia." 18, U.S.C. §414(a) (1940).

During a 1948 revision of the Code, this provision, defining interstate and foreign commerce, was separated from the

balance of the Act and recodified as Section 10. The Report of the Senate Committee on the Judiciary accompanying the recodification bill specifically stated that "the original intent of Congress is preserved." (S. Rep. 1620, 80th Cong., 2d Sess. 1, 1948) Section 10 consolidated four provisions containing identical definitions of interstate and foreign commerce applicable to the four "transportation" offenses proscribed by NSPA (Section 2314), the Dyer Act, (Section 2312), the "Lindbergh Kidnapping Law" (Section 1201) and the National Cattle Theft Act (Section 2316). See Reviser's Notes (Section 10) in Appendix to House Judiciary Committee Report, No. 304, 80th Cong., 1st Sess. (1947).

A host of cases interpreting these related "transportation" statutes firmly

establish that crossing a state or national boundary is required to establish a federal crime. See United States v. Epperson, 451 F.2d 178, 197 (9th Cir. 1971) ("The government need only prove an intent to deprive the owner of the rights and benefits of ownership and to convert the vehicle to the accused's own use and a subsequent crossing of a state [California to Mexico] border." (emphasis added); United States v. Casey, 428 F.2d 229, 231 (5th Cir.), cert. denied, 400 U.S. 389 (1970) (Section 2312 conviction reversed for insufficient proof that appellant became knowingly involved in transporting stolen car until "after the car crossed the state line"); United States v. Martin, 375 F.2d 956 (6th Cir. 1967) (Section 2312 conviction overturned because prosecution failed to prove that stolen

vehicle had crossed a state border); Whitaker v. Hitt, 285 F. 797, 799 (D.C. Cir. 1922) ("moving as a stolen automobile under its own power from one state to another [is] transportation in interstate commerce"); see also United States v. Hines, 563 F.2d 737, 739-40 (5th Cir. 1977) (Section 2316 conviction reversed because of insufficient proof that stolen cattle had been transported across a state boundary line); United States v. Moore, 571 F.2d 76, 81-82 (2d Cir. 1978) (kidnapping conviction reversed where insufficient evidence that victim was "transported out of the state of New York"); United States v. Napier, 518 F.2d 316, 318 (9th Cir.), cert. denied, 423 U.S. 895 (1975) ("it is sufficient if the Government proves beyond a reasonable doubt that the defendant willfully and knowingly transported the [kidnap]

victim from one point to another, and in so doing, he crossed a state line" (emphasis added)).

Thus, it is clear that the Second Circuit's expansive and erroneous interpretation of Section 2314 may well expand the jurisdiction of three similar federal statutes, all of which proscribe transportation in interstate or foreign commerce and all of which have required, to date, the crossing of a state or national border. Certiorari should be granted to review the Second Circuit's departure from prior law and its new and expansive interpretation of these long-standing federal criminal transportation statutes.

CONCLUSION

For the reasons stated herein, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1075—September Term, 1979

(Argued: April 21, 1980 Decided: August 29, 1980)

Docket No. 80-1047

UNITED STATES OF AMERICA,

Appellee,

v.

PAUL AJLOUNY,

Appellant.

B e f o r e :

WATERMAN, TIMBERS and NEWMAN,

Circuit Judges.

Appeal from a judgment of the District Court for the Eastern District of New York (Mark A. Costantino, Judge), after a jury trial, convicting appellant of

transportation of stolen property in foreign commerce in violation of 18 U.S.C. § 2314.

Affirmed.

JOHN R. WING, New York, N.Y. (Edward Burke, Julia Tobey, and Weil, Gotshal & Manges, New York, N.Y., on the brief), *for appellant.*

STEVEN G. NELSON, Asst. U.S. Atty., Brooklyn, N.Y. (Edward R. Korman, U.S. Atty., Harvey M. Stone, Asst. U.S. Atty., Brooklyn, N.Y., on the brief), *for appellee.*

NEWMAN, *Circuit Judge:*

Paul Ajlouny appeals from a conviction after a 17-day trial in the United States District Court for the Eastern District of New York (Mark A. Costantino, Judge) upon a jury verdict finding him guilty of transportation of stolen property in foreign commerce in violation of 18 U.S.C. § 2314 (1976). The jury was unable to reach a verdict and a mistrial was declared on the other 136 counts of the indictment, which charged Ajlouny with having used a "blue box"[1] to defraud the New York Telephone Company in violation of 18 U.S.C. § 1343 (1976). We affirm the conviction on the § 2314 count.

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1 According to trial testimony, a blue box is a device that simulates tones used by the telephone company, thereby permitting long-distance calls to be made without generating any records and hence without incurring charges.

Appendix A - Opinion of the United States Court of Appeals for the Second Circuit

In March, 1978, the telephone company investigator in charge of the investigation of blue box use on Ajlouny's phone, advised customs agent Stephen Rogers that Ajlouny had made blue box calls to various locations in the Middle East. The telephone company investigator also permitted Rogers to listen to a taped conversation with the investigator in which Ajlouny requested that the blue box investigation be halted and warned that it was "stirring up a hornet's nest," "blowing his cover," and endangering the lives of certain people in Israel and the United States. Through their own investigation, customs officials determined that some of the blue box calls placed from Ajlouny's residence had been made to PLO headquarters in Beirut.

In early April, Rogers and other customs agents began surveillance of Ajlouny to determine whether he was the individual who had been placing blue box calls from phone booths in the vicinity of his residence. One morning, Rogers and another customs agent followed Ajlouny to a small shopping center where, according to Rogers, they observed him "apparently supervising the loading" of a cargo container. Through independent investigation, the customs agents learned that the container was under lease to Ajlouny and was scheduled to depart for Doha, Qatar, on April 17, 1978.

In mid-April when they discovered that the container was no longer in the shopping center, Rogers and other agents proceeded to a Brooklyn pier where they located the container in a customs control area. On the day the container was scheduled to be shipped, the customs agents obtained the dock receipt, which described the contents of the container as air conditioning equipment. The agents then proceeded to unseal and search the

container,[2] which had not yet been loaded on board ship. Inside the container, the agents found considerable quantities of teletype and telecommunications equipment; no air conditioning equipment was found. The same day, telephone company investigators identified some of the equipment found in the container as stolen property.

Ajlouny was arrested the day after the search and ultimately indicted for transporting stolen telecommunications equipment in foreign commerce in violation of 18 U.S.C. § 2314. After receiving his Miranda warnings, he admitted that he had arranged for shipment of the telecommunications equipment, but denied that the property was stolen. Prior to trial, he moved on Fourth Amendment grounds to suppress all evidence resulting from the search of the cargo container. Judge Costantino denied his suppression motion, *United States v. Ajlouny*, 476 F. Supp. 995, 1001-04 (E.D.N.Y. 1979), and permitted the contents of the container to be introduced into evidence at trial.

I.

On appeal, Ajlouny first contends that the search of the container was conducted without a search warrant and in the absence of "probable cause" or even "reasonable suspicion." On this basis, he urges that the search was unlawful under both Fourth Amendment and federal statutory standards, and that the admission

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2 At the suppression hearing, Agent Rogers testified that he also knew, prior to the search of the cargo container, that Ajlouny was affiliated with the PLO and a pro-Palestinian newspaper, had a license to carry a gun, and had previously attempted to import three guns into the State of New York.

of evidence obtained from the search requires reversal of his conviction.

The Government concedes that the search was warrantless and does not dispute the defendant's contention that it was not based on probable cause. But the Government contends, and Judge Costantino ruled, 476 F. Supp. at 1002-03, that the search was nevertheless lawful under the so-called "border search exception." We agree.

The border search exception, at least as it applies to searches of persons and property entering the country, has enjoyed a long judicial history. As the Supreme Court observed in *United States v. Ramsey*, 431 U.S. 606, 619 (1977):

> Border searches . . . from before the adoption of the Fourth Amendment, have been considered to be "reasonable" by the single fact that the person or item in question had *entered* into our country from outside. There has never been any additional requirement that the reasonableness of a border search depended on the existence of probable cause. This longstanding recognition that searches at our borders *without probable cause and without a warrant* are nonetheless "reasonable" has a history as old as the Fourth Amendment itself. [Emphasis added].

See *United States v. Thirty-seven Photographs*, 402 U.S. 363, 376 (1971); *Carroll v. United States*, 267 U.S. 132, 154 (1925); *United States v. Asbury*, 586 F.2d 973, 975 (2d Cir. 1978).

Until recently, the applicability of the border search exception to export searches, such as the one conducted by customs officials in this case, was an open question.

However, in *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 63 (1974), the Supreme Court noted that "those entering and *leaving* the country may be examined as to their belongings and effects, all without violating the Fourth Amendment . . . ." (Emphasis added). Admittedly, this statement is dictum, since the issue before the Court did not concern the lawfulness of customs searches. Subsequently, this Circuit relied on the Supreme Court's statement to hold squarely that the border search exception applies to items leaving as well as entering the country. *United States v. Swarovski*, 592 F.2d 131, 133 (2d Cir. 1979);[3] *accord, United States v. Stanley*, 545 F.2d 661, 665-67 (9th Cir. 1976), *cert. denied*, 436 U.S. 917 (1978); see, *United States v. Asbury, supra*, 586 F.2d at 975. *Contra, People v. Esposito*, 37 N.Y.2d 156, 160 (1975). Though the item searched in *Swarovski* was the luggage of a person about to leave the country, the

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3 Appellant contends that *Swarovski* held only that departure searches are constitutional despite lack of a warrant, but did not resolve the question of whether such searches may be conducted in the absence of probable cause. We do not agree that the holding was as narrow as appellant urges. From a constitutional perspective, a search warrant will generally be required whenever probable cause is necessary for a search. The only exception is where exigent circumstances excuse the obtaining of a search warrant. *United States v. United States District Court*, 407 U.S. 297, 318 (1972); *Chambers v. Maroney*, 399 U.S. 42, 51 (1970). Yet *Swarovski* upheld a "warrantless" departure search without any mention of exigent circumstances. This omission was not an oversight. What *Swarovski* implicitly holds is that probable cause is no more required for a departure search than is a warrant, because such a search is within the ambit of the border search exception. *See United States v. Ramsey, supra*, 431 U.S. at 621 (" 'border search' exception is not based on the doctrine of 'exigent circumstances' ").

This view of *Swarovski* is confirmed by the opinion's reliance on *United States v. Stanley*, 545 F.2d 661, 667 (9th Cir. 1976), *cert. denied*, 436 U.S. 917 (1978), which squarely holds that probable cause is not constitutionally necessary for a departure search.

ruling applies to items imminently to be exported, whether or not accompanying a traveler. Application of the border search exception depends upon the nexus between the goods and a border crossing, regardless of the circumstances under which the property subjected to search moved or will move across the border. See *United States v. Ramsey, supra*, 431 U.S. at 620; *United States v. Doe*, 472 F.2d 982, 984 (2d Cir.), *cert. denied*, 411 U.S. 969 (1973).

The circumstances of this case establish that the border search exception applies and permits a routine search without probable cause or even reasonable suspicion. We have observed that "the precise limits of the border area depend on the particular factual situation presented by the case raising the issue." *United States v. Glaziou*, 402 F.2d 8, 12 (2d Cir. 1968), *cert. denied*, 393 U.S. 1121 (1969). The container searched in this case was located on a pier, within a customs area, and marked for shipment abroad. It was therefore amenable to a routine border search. And the imminent crossing of the border alone makes the search of the container reasonable, see *United States v. Ramsey, supra*, 431 U.S. at 619; *United States v. Nieves*, 609 F.2d 642, 645 (2d Cir. 1979), *cert. denied*, 100 S. Ct. 1044 (1980), though reasonable suspicion would be required for more intrusive invasions of personal privacy. *United States v. Asbury, supra*, 586 F.2d at 975; see *United States v. Klein*, 592 F.2d 909, 911 (5th Cir. 1979). Though the facts known to the agents may well have established reasonable suspicion, as found by the District Judge, 476 F. Supp. at 1003, we hold that even if such reasonable suspicion was lacking, the search did not violate the Fourth Amendment.

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Appellant further contends that even if constitutional standards were not exceeded, the search of the container and the subsequent seizure of its contents violated the statutory limitations of 22 U.S.C. § 401(a) (1976).[4] This statute authorizes seizure of articles exported in violation of law. It conditions this seizure authority on the existence of probable cause to believe that the articles "are intended to be or are being or have been exported . . . in violation of law."[5] The statute applies in terms to arms and munitions, but includes "other articles" and has been consistently applied to any items destined for unlawful export.[6]

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4 Subsection 401(a) provides, in relevant part:

> Whenever an attempt is made to export or ship from or take out of the United States any arms or munitions of war or other articles in violation of law, or whenever it is *known* or there shall be *probable cause to believe* that any arms or munitions of war or other articles are intended to be or are being or have been exported or removed from the United States in violation of law, the Secretary of the Treasury, or any person duly authorized for the purpose by the President, may *seize and detain* such arms or munitions of war or other articles. . . . All arms or munitions of war and other articles . . . seized pursuant to this subsection shall be *forfeited*. [emphasis added]

5 The structure of the statute permits a reading that renders the probable cause limitation inapplicable to some seizures. The first clause of the statute appears to permit seizure, without probable cause, "Whenever an attempt is made to export . . . articles in violation of law." The probable cause limitation applies, in terms, when the articles are "intended to be or are being or have been exported . . . in violation of law." It may be that Congress intended to distinguish between border areas and other locations, limiting the seizure power when the articles are away from a border area, as where they are destined for export, in transit, or have arrived at their foreign destination, but placing no statutory limitation (beyond whatever the Constitution imposes) on seizure at a border area where "an attempt" to export would be expected to occur. In view of our resolution of appellant's statutory argument, we need not rely on this possible interpretation.

6 Though "primarily directed to limiting the export of war materials in protection of American neutrality and foreign policy," § 401 has

Though § 401(a) has been held implicitly to authorize searches as well as seizures of goods for export, *Samora v. United States*, 406 F.2d 1095, 1098 (5th Cir. 1969); *United States v. Marti*, 321 F. Supp. 59, 63-64 (E.D.N.Y. 1970),[7] we find no basis for reading its probable cause requirement as a limitation on searches. The provision itself mentions seizures and forfeitures, not searches. And the legislative history gives no indication that authority to search was being limited. The predecessor of § 401, Espionage Act of 1917, ch. 30, tit. VI, 40 Stat. 223 (1917), provided an elaborate

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also "been consistently applied to other classes of goods." *United States v. Marti*, 321 F. Supp. 59, 63 (E.D.N.Y. 1970); *see, e.g., United States v. Chabot*, 193 F.2d 287 (2d Cir. 1951)(gold); *Zarranz v. United States*, 182 F.2d 650 (5th Cir. 1950)(auto); *Joseph B. Cooper & Son, Inc. v. United States*, 174 F.2d 619 (5th Cir.), *cert. denied*, 338 U.S. 824 (1949)(platinum); *United States v. Marti, supra* (jewelry); *United States v. 200 Watches*, 66 F. Supp. 228 (S.D. N.Y. 1946)(watches).

7 We have previously held that customs officials have statutory authority to conduct inspections at a point of embarkation of cargo being shipped abroad. *United States v. Chabot, supra*, 193 F.2d at 290. In addition to § 401, *see* 50 U.S.C. App. § 2403(b)(1) (Supp. II 1978) (President may "prohibit or curtail the exportation, except under such rules and regulations as he shall prescribe, of any articles"); 15 C.F.R. § 386.8(b)(1) (1979) (commodities declared for export "are subject to examination by customs officials for the purpose of verifying the commodity" and assuring compliance with the Export Administration Regulations); 15 C.F.R. § 386.8(b)(5) (1979) (customs office is "authorized to inspect and search any exporting carrier at any time to determine whether commodities . . . are intended to be, or are being, exported or removed from the United States contrary to the Export Administration Regulations"); 22 C.F.R. § 127.05(a) (1979) (district directors of customs "authorized to take appropriate action to insure observance" of restrictions on export of arms and implements of war, "including but not limited to inspection of loading or unloading of carriers"). *See also* 19 U.S.C. § 1581(a) (1976) (customs officer may "at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters . . . or at any other authorized place . . . , and search . . any person, trunk, package, or cargo on board").

procedure for seizures and forfeitures of property sought to be exported in violation of law. Seizures were governed by the same probable cause standard, and almost the identical language, now found in § 401. In addition, § 2 of the statute required the obtaining of a warrant "to justify the further detention of the property" and § 3 permitted the owner or claimant to petition in the district court for return of the property. These provisions were primarily designed to protect innocent owners and claimants from the inconvenience and expense associated with unwarranted seizure and detention of their property. *United States v. 21 Pounds, 8 Ounces, of Platinum*, 147 F.2d 78, 81 (4th Cir. 1945); see *Rimmer v. United States*, 172 F.2d 954, 959 (5th Cir. 1949); *United States v. 267 Twenty-Dollar Gold Pieces*, 255 F. 217, 221 (W.D. Wash. 1919). There is no indication, however, that the law was also intended to protect persons against the less serious interference with property rights associated with a customs search.[8]

Once the search had discovered the telecommunications equipment in a container marked for shipment abroad with papers indicating that the contents was air conditioning equipment, the agents clearly had the probable cause § 401 requires to seize and detain the items. Since the search and subsequent seizure did not

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8 In 1953, the Act was amended to its present form. Among the most significant of the changes was the streamlining of the procedures "for effecting forfeiture and disposition of property being or intended to be exported in violation of law," including the elimination of the warrant of detention requirement. H.R. Rep. No. 1073, 83rd Cong., 1st Sess. 1-2 (1953), *reprinted in* [1953] U.S. Code Cong. & Ad. News 2386, 2386-7. Though these and the other changes accomplished by the 1953 amendment were substantial, they in no way affected the original scope of the limitations of the Espionage Act, which continue to be applicable only to seizures and forfeitures.

violate either § 401 or the Fourth Amendment, we affirm Judge Costantino's denial of the motion to suppress.

II.

Appellant next contends that the Government failed to prove the occurrence of a border-crossing, an event he asserts is an essential element of an offense under 18 U.S.C. § 2314. The Government concedes that the cargo container was intercepted by customs officials before it had moved beyond the borders of the United States, but argues that its burden was nevertheless met by proof that the container had been transported to a restricted customs area and placed in the possession of a shipping company with instructions that it be shipped to a foreign destination. We find the Government's position persuasive.

The express terms of § 2314 do not indicate whether a border-crossing is a required element of the offense. The section provides, in pertinent part, that:

> Whoever *transports in* interstate or *foreign commerce* any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . . [s]hall be fined not more than $10,000 or imprisoned not more than ten years, or both. . . . [emphasis added].

The definitions of "interstate commerce" and "foreign commerce" are set out in 18 U.S.C. § 10 (1976):

> The term "interstate commerce" . . . includes commerce between one State, Territory, Possession, or the District of Columbia and another State,

> Territory, Possession, or the District of Columbia. The term "foreign commerce" . . . includes commerce with a foreign country.

The case law is similarly ambiguous on the need for an actual crossing of the border. Courts have frequently had occasion to observe that purely intrastate transportation of stolen property will not support a conviction under § 2314, *United States v. Walker*, 575 F.2d 209, 214-15 (9th Cir.), *cert. denied*, 439 U.S. 931 (1978); *United States v. Poole*, 557 F.2d 531, 535-36 (5th Cir. 1977), but they have apparently not been called upon to decide whether the transportation element of the offense always requires an actual border crossing.[9] Unable to locate any direct case authority to support its position, the Government relies on the many cases in which convictions under 18 U.S.C. § 659[10] were upheld,

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9 Some of the cases cited by the appellant contain language that supports his view concerning the necessity of a border-crossing. *United States v. Squires*, 581 F.2d 408, 411 (4th Cir. 1978); *United States v. Scandifia*, 390 F.2d 244, 249-50 (2d Cir. 1968), *remanded on other grounds*, 394 U.S. 310 (1969); *United States v. Walker*, 176 F.2d 564, 566 (2d Cir.), *cert. denied*, 338 U.S. 891 (1949). In each of these cases, however, a crossing of the border was determined to have occurred. The question whether the statute reaches items at a border imminently to be transported across it was not presented.

10 Section 659 provides, in pertinent part, as follows:

> Whoever embezzles, steals, or unlawfully takes . . . any goods or chattels *moving as or which are a part of or which constitute an interstate or foreign shipment* of freight, express, or other property; or
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> . . . Whoever embezzles, steals, or unlawfully takes . . . from any railroad car, bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier *moving in interstate or foreign commerce* or from any passenger thereon any money, baggage, goods, or chattels . . .
>
> Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both. . . . [Emphasis added].

(footnote continued on next page)

even though no state or national border had been crossed. See, *e.g.*, *United States v. Astolas*, 487 F.2d 275, 280-82 (2d Cir. 1973), *cert. denied*, 416 U.S. 955 (1974); *United States v. Vilhotti*, 452 F.2d 1186, 1187 n.1 (2d Cir. 1971), *cert. denied*, 406 U.S. 947 (1972); *United States v. Berger*, 338 F.2d 485, 488 (2d Cir. 1964), *cert. denied*, 380 U.S. 923 (1965); *United States v. Sherman*, 171 F.2d 619, 622-23 (2d Cir. 1948), *cert. denied*, 337 U.S. 931 (1949). Appellant contends, however, that differences in the wording and legislative histories of § 659 and § 2314 render inapplicable cases decided under § 659.

We need not decide whether the transportation element of § 2314 is satisfied by facts sufficient under § 659, since even under a more rigorous standard, the element of transportation "in foreign commerce" was established in the circumstances of this case. A shipment is sufficiently "in foreign commerce" for purposes of § 2314 once property bound for a foreign destination arrives in a customs area. There is no question that the Commerce Clause permits Congress to reach stolen goods at such a location, and we see no reason to doubt that Congress intended to do so. Even if § 2314 is concerned with the crossing of a national boundary, we believe Congress was not aiming only at stolen goods moving across a technical boundary line, but also wanted to reach shipments in the course of such a crossing, including at least goods at a dockside customs area.

The terms "interstate commerce" and "foreign commerce" are defined in the same manner for purposes of this section as for § 2314. 18 U.S.C. § 10.

III.

Ajlouny next contends that his Fourth Amendment rights were violated because of wiretapping. The Government acknowledged in the District Court that the defendant's voice was overheard during warrantless electronic surveillance coinciding closely in time with the commission of the offense for which he was convicted. In January, 1979, in response to the defendant's request to check agency records to determine if he had been a target of electronic surveillance, the Government notified the defendant that his conversations had been overheard by the FBI "during the course of foreign intelligence national security electronic surveillances." Records of these conversations and descriptions of the premises which were the subject of the surveillances were submitted to the District Court *ex parte* for *in camera* inspection, with a request not to disclose them to the defendant. These submissions were accompanied by an affidavit of then Attorney General Griffin Bell, certifying that disclosure of the sealed materials "would prejudice the national interest" and representing that the surveillances had been:

> . . . authorized by the Attorney General pursuant to the power delegated to him by the President of the United States in the exercise of his authority relating to the Nation's foreign affairs as described in 18 U.S.C. § 2511(3), to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain counter-intelligence (including foreign) information deemed essential to the security of the United States, and to protect national security information against foreign intelligence activities.

Additional records of FBI surveillance were submitted to the District Court in May, 1979.

After reviewing the records *in camera*, Judge Costantino denied Ajlouny's discovery and suppression motions, finding that the statements, though obtained without a warrant, were lawfully recorded during the course of foreign intelligence surveillance "of legitimate concern to the national security." *United States v. Ajlouny, supra*, 476 F. Supp. at 999 n.2. The District Court also found that the statements did "not concern the subject matter of the indictment, and were not used to initiate the investigation concerning the crimes charged." *Id.* Finally, the Court ruled that the *in camera* procedure employed in making these determinations was proper under the circumstances. *Id.* We agree that the defendant's discovery and suppression motions were properly denied.

In *Alderman v. United States*, 394 U.S. 165 (1969), the Supreme Court held that a defendant is entitled to disclosure, without prior *in camera* review, of all records of illegal surveillance, for the purpose of determining whether the Government's evidence at trial is tainted by the illegality. In so holding, the Court emphasized that the task of identifying "those records which might have contributed to the Government's case" is "too complex, and the margin for error too great, to rely wholly on the *in camera* judgment of the trial court."[11] *Id.* at 182. Two weeks later, the Court

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11 The Court acknowledged that the disclosure of surveillance records might "compel the Government to dismiss some prosecutions in deference to national security or third-party interests," but concluded that the requirement was nevertheless necessary to guard "against the possibility that the trial judge, through lack of time or unfamiliarity with the information contained in and suggested by the materials, will be unable to provide the scrutiny which the

observed in a brief *per curiam* opinion that the *Alderman* disclosure requirement is limited to illegal surveillance and therefore does not apply where the district court has made a finding that the surveillance was lawful. *Giordano v. United States*, 394 U.S. 310, 313 (1969). As noted, Judge Costantino made just such a finding in this case.

The defendant challenges the District Court's finding on two grounds. He first contends that the Court erred as a matter of law in concluding that foreign intelligence electronic surveillance does not require a warrant. The defendant also raises the procedural objection that the subsidiary matters decided by Judge Costantino in upholding the legality of the surveillances, such as whether in fact they were conducted for national security and foreign intelligence purposes and whether they were reasonable in nature and scope, could not properly have been resolved without an adversary hearing and disclosure of relevant information. We first consider this procedural objection.

The Supreme Court has not yet decided what procedure the district courts are to follow in making threshold determinations concerning the lawfulness of electronic surveillance. *Giordano v. United States, supra*, 394 U.S. at 314 (Stewart, J., concurring). The Court has suggested, however, that adversary proceedings and full disclosure are not necessarily required "for resolution of every issue raised by an electronic surveillance." *Taglianetti v. United States*, 394 U.S.

Fourth Amendment exclusionary rule demands." *Alderman v. United States, supra*, 394 U.S. at 184.

Justices Harlan and Fortas dissented, in separate opinions, from the majority's holding that the same disclosure rule applies irrespective of whether disclosure implicates national security interests. *Id.* at 197-200, 209-11.

316, 317 (1969) (*per curiam*). To the contrary, such protections will not be required when the task is such that *in camera* procedures will adequately safeguard the defendant's Fourth Amendment rights, *id.* at 317-18.

We conclude that the *in camera* procedures employed by Judge Costantino in this case were adequate for purposes of determining the lawfulness of the FBI's surveillance of the defendant.[12] The issues of whether the surveillance was conducted for national security and foreign intelligence purposes and whether it was reasonable in scope, were limited in nature and were not dependent on a painstaking search through "a large volume of factual materials." *Alderman v. United States, supra*, 394 U.S. at 183-84. Thus, the factors that impelled the Supreme Court to require disclosure

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12 We need not decide whether *ex parte, in camera* proceedings are adequate for the determination of all questions bearing upon the legality of electronic surveillance. Other courts have expressed differing views on the subject. *See, e.g., United States v. Butenko*, 494 F.2d 593, 598, 607 (3d Cir.) (*en banc*), *cert. denied*, 419 U.S. 881 (1974) (where the question concerns the legality of the taps, the district court has "discretion to grant or deny" requests for disclosure); *United States v. Hoffman*, 334 F. Supp. 504, 506 (D.D.C. 1971) (preliminary determination of whether defendant's conversations were overheard in violation of Fourth Amendment can be made without an evidentiary hearing); *United States v. Brown*, 317 F. Supp. 531, 535 (E.D. La. 1970), *aff'd*, 484 F.2d 418 (5th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974) ("the determination of the legality of the surveillance can appropriately be made in *ex parte, in camera* proceedings").

The Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, which did not become effective until after completion of the surveillances in question here, provides for *ex parte, in camera* determination of the lawfulness of electronic surveillance, upon the filing by the Attorney General of a sworn affidavit that "disclosure or an adversary hearing would harm the national security of the United States." Disclosure of materials to the defendant is permitted "only where . . . necessary to make an accurate determination of the legality of the surveillance." 50 U.S.C. § 1806(f) (Supp. II 1978).

in *Alderman* to assess whether evidence may be tainted are not present here. Having reviewed the *in camera* records, we agree with the District Court that this was a foreign intelligence surveillance, justifiably and reasonably conducted. We are also convinced that accurate resolution of the factual issues would not have been materially advanced by either disclosure of information to the defendant or an adversary hearing.

The substantive issue of whether foreign intelligence surveillance can be conducted lawfully without a judicial warrant was specifically left undecided by the Supreme Court in *United States v. United States District Court*, 407 U.S. 297, 308, 321-22 (1972); see *Giordano v. United States, supra*, 394 U.S. at 314-15 (Stewart, J., concurring). The Third, Fifth, and Ninth Circuits subsequently determined that warrantless foreign intelligence gathering surveillance does not contravene the Fourth Amendment, *United States v. Buck*, 548 F.2d 871, 875 (9th Cir.), *cert. denied*, 434 U.S. 890 (1977); *United States v. Butenko*, 494 F.2d 593, 605 (3d Cir.) (*en banc*), *cert. denied*, 419 U.S. 881 (1974); *United States v. Brown*, 484 F.2d 418, 426 (5th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974), while the D.C. Circuit has expressed the view, in dicta, that such warrantless surveillance is unlawful. *Zweibon v. Mitchell*, 516 F.2d 594, 651 (D.C. Cir. 1975) (*en banc*), *cert. denied*, 425 U.S. 944 (1976). Our Circuit has not yet decided this important issue, and we find it unnecessary to do so in this case If the surveillance were unlawful, the defendant would be entitled to disclosure of its results, pursuant to *Alderman*, and would then argue that the exclusionary rule requires suppression of any evidence obtained as a result of the surveillance. Since, for reasons to be discussed, we do not believe it

would be appropriate to apply the exclusionary rule in this case, even if the surveillance were unlawful and did lead to any trial evidence, we need not adjudicate the lawfulness of the surveillance.

The Supreme Court has determined that the primary, if not the sole, justification for the exclusionary rule is the deterrence of police conduct that violates Fourth Amendment rights. *Stone v. Powell*, 428 U.S. 465, 486 (1976); *United States v. Janis*, 428 U.S. 433, 446 (1976); *United States v. Calandra*, 414 U.S. 338, 347-48 (1974). A second justification, the "imperative of judicial integrity," is also mentioned in some cases, see, *e.g., United States v. Peltier*, 422 U.S. 531, 536-38 (1975); *Elkins v. United States*, 364 U.S. 206, 222 (1960), but its importance as a basis for suppressing probative evidence has now been discounted substantially, if not completely, see *Stone v. Powell, supra*, 428 U.S. at 485. Consistent with its views concerning the primary purpose of the exclusionary rule, the Court, in recent years, has refused to apply the rule to situations where it would achieve little or no deterrence. For example, in *United States v. Peltier, supra*, 422 U.S. at 541-42, the Court declined to give retroactive effect to an earlier search and seizure ruling on the ground that suppression would serve no deterrent purpose. See *Desist v. United States*, 394 U.S. 244, 254 n.24 (1969) ("we simply decline to extend the court-made exclusionary rule to cases in which its deterrent purpose would not be served"). And, in *United States v. Calandra*, the Court refused to apply the exclusionary rule to grand jury proceedings because, in its view, the result would be "a speculative and undoubtedly minimal advance in the deterrence of police misconduct at the expense of substantially impeding the role of the grand

jury." *United States v. Calandra, supra*, 414 U.S. at 351-52. A process of balancing similar to that employed in *Calandra* appears in other exclusionary rule cases as well. *Stone v. Powell, supra*, 428 U.S. at 493-94 ("additional incremental deterrent effect" of permitting search and seizure claims to be raised on federal collateral review of state convictions is "outweighed by the acknowledged costs to other values vital to a rational system of criminal justice"); *United States v. Janis, supra*, 428 U.S. at 453-54 (additional marginal deterrence provided by forbidding use in federal civil proceeding of evidence illegally seized by state officials does not outweigh the cost to society of applying the rule in that situation); *Alderman v. United States, supra*, 394 U.S. at 174-75 (additional benefits of extending exclusionary rule to persons aggrieved by introductions of evidence unlawfully obtained in violation of another person's privacy rights does not justify "further encroachment upon the public interest").

We believe this is a case in which neither deterrence nor the so-called "imperative of judicial integrity" would be served by application of the exclusionary rule. The Supreme Court has determined that where "law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law," the imperative of judicial integrity is not offended by permitting unlawfully obtained evidence to be introduced at trial. *Stone v. Powell, supra*, 428 U.S. at 485 n.23; *United States v. Peltier, supra*, 422 U.S. at 537-38; see *United States v. Reda*, 563 F.2d 510, 511-12 (2d Cir. 1977) (*per curiam*), *cert. denied*, 435 U.S. 973 (1978). By all indications, the FBI's surveillances of Ajlouny met this test. At the time of the surveillances,

neither the federal statutes nor the case law in this Circuit supported the defendant's contention that a warrant was required for foreign intelligence surveillance. Though Congress had established procedures governing the use of electronic surveillance for the investigation and the prevention of specified crimes, 18 U.S.C. §§ 2510-2520 (1976), it had specifically disclaimed any intention of legislating in the national security area, 18 U.S.C. § 2511(3) (1976) (repealed 1978).[13] Moreover, none of the district courts in this Circuit had decided what requirements, if any, the Fourth Amendment imposes upon foreign intelligence surveillance. And, if guidance had been sought from the decisions of other circuits, the preponderant view would have been that such surveillance can be conducted without a warrant. In short, this is not a case where the government agents who initiated the surveillance of the defendant could be charged with knowledge that their conduct was improper. *Cf. United States v. Dien*, 609 F.2d 1038, 1046 (2d Cir. 1979).

The apparent good faith of those who authorized the electronic surveillance of Ajlouny also tends to

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13 Section 2511(3), which was repealed effective October 25, 1978 by the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, Title II, § 201(c), 92 Stat. 1797 provided as follows:

> Nothing contained in this chapter or in section 605 of the Communications Act of 1934 . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government.

undercut any deterrence that might be achieved by application of the exclusionary rule. As the Supreme Court observed in *Michigan v. Tucker*, 417 U.S. 433, 447 (1974), and restated in *United States v. Peltier, supra*, 422 U.S. at 539:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

See *Scott v. United States*, 436 U.S. 128, 135-36 (1978); *United States v. Corcione*, 592 F.2d 111, 118 (2d Cir.), *cert. denied*, 440 U.S. 975, 985 (1979).

More significantly, the need to apply the exclusionary rule to achieve deterrence has been virtually eliminated by the significant clarification of standards that occurred with the enactment in October, 1978 of the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. §§ 1801-1811 (Supp. II 1978)). The Act now requires, with limited exceptions not relevant to this case,[14] the

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14 Subsections 1802(a)(1)(A)(i) and (a)(1)(A)(ii) of Title 50 permit foreign intelligence electronic surveillance without a court order only where the surveillance is solely directed at either the "acquisition of the contents of communications transmitted by means of communications used exclusively between or among foreign powers," or the "acquisition of technical intelligence, other than the spoken communications of individuals, from property or premises under the

obtaining of a court order before foreign intelligence surveillance may be conducted. Though the surveillance of Ajlouny, occurring prior to the Act's effective date, was not subject to this or any other statutory warrant requirement, passage of the Act substantially reduced the importance of deciding in this case whether the Constitution independently requires the obtaining of a warrant for foreign intelligence electronic surveillance. Though the exclusionary rule remains available in the event the new statutory requirements are not observed, there is little if any need to apply the rule to a possible Fourth Amendment violation now that agents' conduct in the future will normally be guided and measured by statutory standards. Application of the exclusionary rule in this case is therefore inappropriate. Consequently, we decline to adjudicate the constitutionality of warrantless foreign intelligence surveillance.

IV.

Finally, appellant contends that Judge Costantino improperly denied his motions pursuant to Fed. R. Crim. P. 8(a) and 14 for severance of the § 2314 charge from the 136 blue box counts. He urges that the two sets of counts were "unrelated" to one another, and that joinder was both improper as a matter of law and prejudicial to his right to a fair trial.

The propriety of joinder under Rule 8(a)[15] is a question of law. Improper joinder requires reversal

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open and exclusive control of a foreign power." The FBI's surveillance of Ajlouny fell within neither of these categories.

15 Rule 8(a) provides:

Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses

unless the Rule 8 error was harmless. *United States v. Werner*, 620 F.2d 922, 926 (2d Cir. 1980). In this case, the Government contends, and the District Court, in effect, found, that the stolen property count and the blue box counts represented "two or more acts or transactions connected together or constituting parts of a common scheme or plan." In its opinion denying defendant's pretrial severance motion, the District Court concluded that it was "not speculative" for the Government to attempt to show that the purpose of "the blue box calls was to facilitate the theft and shipments of the communications equipment." 476 F. Supp. at 1000. This conclusion was principally grounded on the Government's representation that the theft was part of a scheme to aid the PLO in establishing an independent telecommunications system and the Court's finding that the clandestine calls, some of which were alleged to have been placed to locations in the Middle East having a connection to the stolen property count, were an "appropriate vehicle for facilitating the plan." *Ibid.*

Having examined the Government's pretrial representations and proof at trial, we find substantial justification for the joinder of the stolen property count with at least one of the blue box counts. Evidence was introduced at trial that the blue box call charged in count 118 of the indictment was placed to the telephone number of the company in Qatar to which the cargo container was addressed. An available inference, sufficient to justify joinder on a theory of "common

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charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

scheme or plan," is that the purpose of this call was to discuss arrangements for the shipment of the stolen communications equipment.

By contrast, the relationship of most of the other blue box calls to the common scheme or plan, particularly those placed to locations within the United States, is unclear.[16] With respect to the vast majority of the 136 calls, the Government made no effort to establish any connection to either the stolen property count or the alleged plan to set up an independent PLO telecommunications network. We nevertheless conclude that even if the joinder of the stolen property count with the apparently unrelated blue box counts was improper under Rule 8(a),[17] the error was harmless.

Our previous decisions have established that an improper joinder under Rule 8 will generally constitute harmless error if "all or substantially all the evidence admitted at the joint trial would have been admissible in separate trials." *United States v. Werner, supra*, 620 F.2d at 926 n.5; *United States v. Turbide*, 558 F.2d 1053, 1061 (2d Cir.), *cert. denied*, 434 U.S. 934 (1977); *United States v. Granello*, 365 F.2d 990, 995 (2d Cir.

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16 The Government did attempt to introduce evidence at trial that one of the numbers called with a blue box from the Ajlouny residence was used by the PLO headquarters in Beirut, Lebanon. The number appears in six of the counts charged in the indictment. Judge Costantino declined to admit the proferred evidence.

17 The 136 blue box counts represent offenses of a "similar character" and therefore were properly joined with each other under Rule 8(a). This does not necessarily mean, however, that all the 136 blue box counts were properly joined with the stolen property count. Though at least one of the blue box counts and the stolen property count were joinable as parts of a common scheme or plan, most of the other blue box counts had no apparent connection or similarity to the stolen property count. Our finding of harmless error makes it unnecessary to consider whether joinder was proper on a theory that counts joinable to common counts are joinable to each other.

1966), *cert. denied*, 386 U.S. 1019 (1967). If Ajlouny had been tried only on the stolen property count and count 118, which were related, much of the evidence concerning the other blue box counts would have been admissible to show that the defendant had access to a blue box and that the device was functional when attached to his home telephone. Perhaps the full extent of defendant's alleged use of the blue box would have been cumulative at such a separate trial, but not prejudicial once the jury properly received evidence that defendant had repeatedly defrauded the telephone company. We conclude therefore that if misjoinder occurred, it was harmless error. The same considerations make clear that Judge Costantino did not abuse his discretion in denying severance under Rule 14.

We have considered appellant's other claims of error and find no basis to disturb the conviction.

Affirmed.

APPENDIX B

Opinion of the United States District Court
For the Eastern District of New York

United States of America

v.

Bulus Ajlouny, aka Paul
Ajlouny, Defendant

No. 78 CR 491

United States District Court
Eastern District of New York

September 24, 1979

Reported at 476 F.Supp. 995 (E.D.N.Y. 1979)

Edward R. Korman, U.S. Atty., by Steven G. Nelson, Asst. U.S. Atty., Eastern District of New York, Brooklyn, N.Y., for the Government.

Weil, Gotshal & Manges by John R. Wing, New York City, for defendant.

MEMORANDUM OF DECISION
AND ORDER

COSTANTINO, District Judge.

Defendant, Paul Ajlouny ("Ajlouny"), is charged in a 137 count indictment. Count One charges a violation of 18 U.S.C. § 2314. It alleges that Ajlouny transportated stolen telecommunications equipment in foreign commerce. Counts Two through One Hundred Thirty-seven charge violations of 18 U.S.C. §1343. They allege that Ajlouny used a "blue box" to make telephone calls in order to defraud the New York Telephone Company for the use of such services. He now makes the following motions with respect to the indictment:

(1) to dismiss the indictment for a violation of the Speedy Trial Act, 18 U.S.C. § 3161 et seq.;

(2) to dismiss the indictment for failing to present evidence in an unbaised way to the grand jury;

(3) to sever Count One from the remaining Counts in the indictment;

(4) to suppress the seizure of a blue box;

(5) to suppress evidence derived from illegal electronic surveillance;

(6) to suppress evidence seized from a shipping container;

(7) to suppress statements made to the Government;

and

(8) for discovery.

The court held an extenstive hearing on the fourth, sixth and seventh points. The court found that an evidentiary hearing was unnecessary on the first, second, third and fifth points, but heard oral argument. The court also inspected in camera the minutes of the grand jury with regard to point 2, and considered additional documentation relative to point 5.

The parties resolved point 8.

After considering the voluminous record the court, the court finds that it must deny defendant's motions to sever, dismiss and suppress, on the basis of fact and law relative to those contentions. The court will now discuss the points raised, and the facts relative to each, seriatim.

I. THE SPEEDY TRIAL CONTENTION

Ajlouny was arrested on April 18, 1978 pursuant to a criminal complaint filed against him. Under the then applicable Speedy Trial Plan for the Eastern District of New York ("Plan"), the Government was required to indict Ajlouny within 45 days from the date of his arrest. Plan Rule 3(a)(2). The time limit was extended for 25 days to June 27, 1978 because a defense motion for a discontinuance. 18 U.S.C. §3161 (h)(8)(A). On June 26, 1978, one day prior to the expiration of the time

limit, the Government voluntarily dismissed the complaint. The Government wanted to investigate Mr. Ajlouny's actions further in order to present the evidence to a Grand Jury for a possible indictment. (Government Affidavit in Opposition). On September 5, 1978 Ajlouny was indicted.

Ajlouny contends that the delay between June 26 and September 5 violated the Plan and requires the dismissal of the indictment as a result. In United States v. Hillegas, 578 F.2d 453 (2d Cir. 1978), the court was faced with a similar problem and held that the time between the dismissal of the complaint and the subsequent indictment was excludable time. The court rejected the contention that the delay required the dismissal of the indictment. Since this court finds the decision in Hillegas to be controlling, it rejects Ajlouny's contentions. See also 18 U.S.C.

§ 3161(h)(6); Plan § 5(d)(3); Plan 9(a)(6); United States v. McClean, 528 F.2d 1250 (2d Cir. 1976) (5 1/2 month delay); United States v. Flores, 501 F.2d 1356 (2d Cir. 1974); United States v. Sebastian, 428 F.Supp. 967 (W.D.N.Y. 1977), aff'd, 562 F.2d 211 (2d Cir. 1977). Moreover, even a technical violation of the Plan would not require a dismissal of the indictment. See Plan § 10(e); United States v. Carini, 562 F.2d 144 (2d Cir. 1977).

Ajlouny also sought a hearing to determine the reason for the Government's dismissal of the complaint. The court denied the request. Here, the Government stated that it intended to present documentary evidence to a grand jury. Based on the Assistant United States Attorney's representations, in his affidavit and in court, the court is satisfied that the Government had a good faith basis for the initial dismissal of the complaint. Under these

circumstances, and in light of the clear legal rule of Hillegas, supra, the court found no need for a hearing on this issue. See United States v. Elsbery, 602 F.2d 1055 (2d Cir. 1979). Accordingly, Ajlouny's motion to dismiss the indictment is denied.

II. THE GRAND JURY CONTENTIONS

Ajlouny contends that the Grand Jury heard inflammatory and irrelevant references concerning his relationship to the Palestine Liberation Organization ("PLO"), and that the prejudice which resulted requires the dismissal of the indictment. In response to this claim, the court held an in camera inspection to determine the nature and scope of any reference to the PLO, during the presentation of evidence to the Grand Jury. An examination of the minutes revealed minimal references to the PLO, which in the context of the proceedings were not inflammatory, if not completely innocuous. Moreover, according to the Gov-

ernment's stated theory of its case, Ajlouny's alleged connection to the PLO appears to be relevant to the Government's inquiry in any event. Since the indictment appears valid on its face, and the presentation to the grand jury was made in a good faith effort to provide material and relevant facts during the investigative stage of the proceedings, the court finds no basis for dismissing the indictment.[1] See United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974); Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972).

Ajlouny also contends that the Government's failure to record the prosecutor's colloquies with the grand jury requires the dismissal of the indictment. While recording the prosecutor's remarks may be the better practice, the failure to record is not a basis for dismissing the indict-

ment. While recording of the prosecutor's remarks may be the better practice, the failure to record is not a basis for dismissing the indictment. United States v. Rubin, 599 F.2d 975 (5th Cir. 1977); United States v. Penden, 472 F.2d 583 (2d Cir. 1973); United States v. Greater Syracuse Bd. of Realtors, Inc., 449 F.Supp. 887 (N.D.N.Y.1978); United States v. Daneals, 370 F.Supp. 1289 (W.D. N.Y.1974)

Accordingly, the motion to dismiss on these grounds is denied.

III. SUPPRESSION OF THE FRUITS OF ELECTRONIC SURVEILLANCE

Ajlouny moves to suppress any evidence derived from illegal electronic surveillance. At the court's request, the Government checked with all of its agencies to determine the existence of any electronic surveillance. The check produced negative results.[2] The court is satisfied with the representations made in court by the Assistant United States Attorney, and finds no need for a further inquiry. See United States v. Van Orsdell, 521 F.2d 1323 (2d Cir. 1975). Accordingly, there is no basis for defendant's motion and it must be denied.[3]

IV. SEVERANCE

Ajlouny moves, pursuant to Fed.R.Crim. P. 8 and 14, to sever Count One from the remaining counts of the indictment. He contends that the stolen property count is unrelated to the blue box counts, and that the joint trial of those counts will severely prejudice his right to a fair trial.

The Government contends that these allegations must fail in light of its theory of the case. It claims that the stolen property count and the blue box counts were properly joined because they represent transactions constituting a common scheme or plan under Fed.R.Crim.P. 8. See United States v. Halper, 590 F.2d 422 (2d Cir. 1978). Specifically, the Government contends that it will seek to prove that the stolen communications equipment was stolen as part of a scheme to aid the PLO in establishing a telecommunications system. It further contends that the

blue box counts relate to this scheme because some of the phone calls listed in those counts were placed to locations in the Middle East having a connection to the stolen property count. The communications equipment was being shipped to the Ocean Trading Company in Qatar. It was listed as being air conditioning equipment, and not communications equipment. Ajlouny allegedly called both the PLO headquarters in the Middle East and the Ocean Trading Company with the aid of the blue box. From these and other factors more fully presented in the record before the court, the Government alleges that the connection between the two sets of counts is clear.

The court finds that there is a logical connection between Count One and the remaining counts. The Government's contentions amply demonstrate the inferences and evidence connecting the crimes. It is not speculative to attempt to show that

Ajlouny's purpose in making the blue box calls was to facilitate the theft and shipments of the communications equipment. If the Government's theory is correct, and supported by proof at trial, then it is clear that the plan for theft and shipment of stolen property would be accomplished quietly. Thus, it would be logical to conclude that the clandestine blue box calls were an appropriate vehicle for facilitating the plan. Significantly, the container was destined for the Ocean Trading Company in Qatar - an address which the Government contends is traceable through one of the phone calls placed by Ajlouny on the blue box. Thus, the testimony relating to the blue box calls will have a logical bearing on the proof in the stolen property count. The link between the phone call and the destination of the shipment will most likely have some bearing on Ajlouny's knowledge of the transactions. While the court is not

attempting to judge the strength of the Government's case, for the purposes of this motion it appears both efficient and economic to try the counts together. Accordingly, severance is unwarranted in light of the facts presented to the court.[4]

V. THE SEARCH OF THE CARGO CONTAINER

Ajlouny also contends that the search of his cargo container on a pier was unconstitutional. He moves to suppress the fruits of the search during the subsequent seizure. The court held a hearing to clarify the surrounding circumstances of that search, and finds that there was no violation of the defendant's rights.

On April 17, 1978 agents of the United States Customs Service, headed by Agent Stephen Rogers, conducted a search of a cargo container on Pier 9A in Brooklyn, New York. The container was in the possession of the shipping company and was scheduled for loading that day on a ship

destined for Doha, Qatar. The container's location was considered to be a customs control area. Once at the pier, the agents acquired the dock receipt for the container, and removed the container to the far end of the pier. The dock receipt indicated that the container was loaded with air conditioning equipment. Upon breaking the seal and opening the doors, the agents found large cartons intermixed with other items. Closer examination revealed that the cartons contained telephone communications equipment. The agents contacted representatives of the Telephone Company who identified the equipment as theirs. The equipment was removed from the pier by the agents.

Prior to the April 17, 1978 search, the agents had placed Ajlouny under surveillance for possible violations of federal munitions laws. During the course of that surveillance, they observed Ajlouny apparently supervising the loading of the con-

tainer at a store located in a shopping center near Ajlouny's home. The agents testified that because the container was flush with the wall and because of their fear of being noticed, they were unable to verify the contents of the container. Agent Rogers, however, had information prior to the April 17 search which he believed in toto would establish that Ajlouny was illegally shipping munitions in the container. He based this conclusion on information which he received for a month prior to April 17. Rogers knew that Ajlouny was affiliated with the Palestine Liberation Organization, which he classified as a terrorist organization. He knew that Ajlouny was licensed to carry a weapon and had information concerning a weapons violation by Ajlouny. He was told by Telephone Company representatives that Ajlouny was making blue box calls to Russia, the PLO and other Middle East loca-

cations. He was also told that Ajlouny was monitoring the fighting in the Middle East. Moreover, when Ajlouny was confronted with the blue box allegations by representatives for the Telephone Company, he indicated that if the Telephone Company's investigation continued people in the United States and Israel could be killed. When Rogers further learned that the destination of the container was Qatar in the Middle East he believed a search for munitions was in order. The April 17 search followed.[5]

Ajlouny contends that a warrantless export search based on less than probable cause is improper and requires the suppression of the seized equipment. The Government concedes that the search was conducted without a warrant and without probable cause. However, it argues that an export search in a customs area, like an import search, is proper even in the absence of a

warrant and probable cause.

It is well settled that warrantless import searches based on less than probable cause are proper. United States v. Ramsey, 431 U.S. 606, 97 S.Ct. 1972, 52 L.Ed.2d 617 (1977); United States v. Glaziou, 402 F.2d 8 (2d Cir. 1968), cert. denied, 393 U.S. 1121, 89 S.Ct. 999, 22 L.Ed.2d 126 (1969). Thus, a reasonable suspicion by customs officials that illegal activity is possible is a sufficient basis to stop and search. United States v. Asbury, 586 F.2d 973, 975-76 (2d Cir. 1978); United States v. Glaziou, supra at 12. Nonetheless, this relaxed standard for stopping and searching is qualified by the requirement of reasonableness. United States v. Asbury, supra at 976. The determination of reasonableness depends upon the facts of each particular case. United States v. Asbury, supra at 976; United States v. Glaziou, supra at 12.

The issue posed by this case is whether the import search standards apply equally to an export search. An affirmative response indicates that an export search may be had without a warrant and without probable cause.

The resolution of the question before the court centers around United States v. Swarovski, 592 F.2d 131 (2d Cir. 1979). Swarovski followed United States v. Asbury, 586 F.2d 973 (2d Cir. 1978). In Asbury the court discussed the standards applicable to border "strip" searches. Asbury involved an import search. Yet, the court noted that "anyone entering or leaving the country may expect to have his luggage and personal effects examined" if the customs officers' decision to search was based on reasonable suspicion. Id. at 975 (emphasis added). Thus, the court equated an import search with an export search. Following that lead, the

court in Swarovski held that the warrantless border search of luggage during departure from the country was proper. 592 F.2d at 133. Thus, it is clear that a warrantless export search is proper.

The next inquiry is whether the warrantless export search requires probable cause. In Swarovski the court held:

> Appellant's contention that customs officials can make such a search only when the person whose effects are being searched is entering the United States is not the law. See 22 U.S.C. § 401(a); California Bankers Ass'n v. Shultz, 416 U.S. 21, 63, 94 S.Ct. 1494, 39 L.Ed.2d 812 (1974); United States v. Chabot, 193 F.2d 287, 290 (2d Cir. 1951); United States v. Stanley, 545 F.2d 661, 667 (9th Cir. 1976), cert. denied, 436 U.S. 917, 98 S.Ct. 2261, 56 L.Ed. 2d 757 (1978); Samora v. United States, 406 F.2d 1095, 1098-99 (5th Cir. 1969).

This terse statement of law leads this court to conclude that the Court of Appeals approved not only warrantless export searches, but also export searches based on less than probable cause. Two factors

support that conclusion. First, the Government's appellate brief in the Court of Appeals raised the issue of probable cause in the context of an export search. The district court in Swarovski made a finding of probable cause, and the Government's brief appears to be in line with that position.[6] However, the Assistant United States Attorney informed this court that United States Attorney Korman specifically argued in Swarovski that since import and export searches are equivalent, neither requires probable cause. Thus, while the decision in Swarovski does not elaborate on this issue, it is clear that the question of probable cause was placed before the court.

The second, and more significant, factor is the court's citation with approval to two decisions, United States v. Chabot, 193 F.2d 287 (2d Cir. 1951) and United States v. Stanley, 545 F.2d 661 (9th

Cir. 1976), cert. denied, 436 U.S. 917, 98 S.Ct. 2261, 56 L.Ed.2d 757 (1978).[7] In Chabot, the defendants challenged the warrantless export search conducted by customs officers at a pier. The court sustained the warrantless search and seizure and held:

> The car had already been delivered, along with the keys, to the freight agent; it was parked alongside the pier when the customs men began to inspect it. The right of customs officials to inspect cargo being shipped abroad at a port of embarkation is apparent . . . (citations omitted). Here, the car was heavily weighted down in the rear without any apparent cause. The fenders, upon tapping, sounded peculiar. The car, in such obviously bad condition, was being shipped abroad. This seems to us sufficient cause to authorize a more thorough and even dismantling search of the car, for possible secret exports. See 22 U.S.C.A. § 401. Both 19 U.S.C.A. §1581 and 22 U.S.C.A. § 401 seem to dispense with the necessity of a search warrant in such circumstances. Id. at 290-91 (emphasis added).

While this Court is reluctant to assume that the court in Chabot intended to rely

on a standard less than probable cause, it appears from the facts of that case, elicited above, that probable cause did not exist to make a search for illegally exported bullion. Moreover, the language of the court in reaching that decision seems to emphasize a standard more relaxed than that of probable cause. Indeed, the court was apparently willing to uphold a warrantless search for "possible" violations of law. Id.

Were Chabot the only peg upon which to hang a rule of law, this court may have appeared pressed to justify its conclusion. Yet, Chabot's ramifications are bolstered by the holding in United States v. Stanley, supra. In Stanley, the court sustained a lower court finding of no probable cause for an export search. However, it reversed the lower court's holding concerning a border search. Aware of the novel situation posed the court noted:

> No case has been found where the constitutionality of a search was premised on the border search exception in the context of one being stopped and searched while leaving the United States. That is the situation here. Id. at 665-66.

The court discussed the law of import searches and their constitutionality. Seeing a clear and compelling analogy between import and export searches, it held that the two are equal under the Fourth Amendment. Accordingly, it sustained a warrantless export search based on less than probable cause.

Since the court in Swarovski cited both Chabot and Stanley with approval, this court must assume that the Court of Appeals approved of the holdings in those cases. Moreover, this court is satisfied that an export search is equivalent to an import search. It would be anomalous to allow the sovereign to protect its borders only against incoming dangers, while fore-

closing the use of similar precautions for sensitive and dangerous materials being illegally exported. See, e.g., United States v. Swarovski, supra. Accordingly, this court finds on the basis of the discussion above that a warrantless export search without probable cause in a customs area is proper.

Having found that an export search and import search derive from the same basis, the court must determine whether there was a reasonable suspicion to conduct the export search in this case. It is apparent from the factors enumerated above that Agent Rogers had a justifiable suspicion for ordering the search of the container. From the information he had received prior to ordering the search Rogers could reasonably suspect that Ajlouny may attempt to violate munitions export laws. Moreover, once at the pier, Rogers' suspicion may have been heightened

by the dock receipt which listed air conditioning equipment as cargo. Rogers knew from his investigation that Ajlouny had no apparent contact with air conditioning equipment, and so could properly suspect that a violation would occur. Finally, once the container had been placed on the pier for shipment overseas, Roger could reasonably believe that Ajlouny intended to export its contents. It is also significant that the cargo destination was the Middle East, "an area of the world in which there is continuing armed conflict." United States v. Keuylian, 602 F.2d 1033 at 1043 (2d Cir. 1979).

Moreover, Roger satisfied his suspicion in a reasonable manner. The container was to be loaded on the ship that day. His failure to act would have unduly complicated matters. His decision to remove the container and search it on the pier prior to loading was a reasonable exercise of his

customs duties. Accordingly, the warrantless export search of the container was proper.

Ajlouny contends, however, that the seized contents of the container must be suppressed because the customs officers failed to procure the Shipper's Export Declaration prior to beginning their search. Testimony at the hearing indicated that the agents possessed only the dock receipt when the search occurred. The shipping packet which contained numerous documents, including the export declaration, was in the possession of the freight forwarding agent located at the World Trade Center in Manhattan. Rogers directed one of the other officers to pick up the packet. Thus, it was not retrived until after the search commenced, and in fact was brought to the pier later in the operation.

Ajlouny's contention needs only a short discussion. The procedures used by

the customs officers were conducted within the general regulations for export clearance. See 15 C.F.R. § 386 et seq. Even if the agents violated the regulations, it is clear that the violation was merely technical. The agents had retrieved the shipping packet later in the day. Thus, the search would have merely been delayed and not foreclosed. Moreover, the violation of agency regulations alone is not a basis for suppression. United States v. Caceres, 440 U.S. 741, 99 S.Ct. 1465, 59 L.Ed.2d 733 (1979).

Accordingly, for all these reasons, the motion to suppress the contents of the container is denied.

VI. SUPPRESSION OF THE BLUE BOX[8]

Ajlouny further contends that seizure of a blue box from a briefcase at the time of his arrest was improper. The Government argues that the blue box was seized incident to a lawful arrest. Based on the facts at the hearing, the court finds that the blue box was seized contemporaneous with an arrest based on probable cause.

After having searched the container on Pier 9A, and having found stolen telecommunication equipment, the customs agents procured a warrant for Mr. Aljouny's arrest.[9] On April 18, 1979 the agents went to Ajlouny's residence in Hempstead, New York to execute the warrant. Prior to arriving at Ajlouny's home, Agent Rogers briefed the other agents and state police officers[10] on the procedure to follow. Rogers informed the other agents and officers that Ajlouny was licensed to

carry a gun and that it was likely that he would have a gun at the time of the arrest. As a precautionary measure, Rogers decided to make the arrest after Ajlouny left his house. Agent Rogers indicated that searching for a blue box was not discussed. The officers and agents thereupon stationed themselves around the Ajlouny home at approximately 8:00 a.m.

At sometime between 8:05 a.m. and 8:15 a.m. Ajlouny was observed leaving the side entrance of his home and entering his car parked in the driveway. The agents and officers converged upon the scene,and blocked the driveway. Rogers approached Ajlouny on the driver's side of the car and informed Ajlouny that he was being placed under arrest. The driver's door was open. Upon approaching Ajlouny, Rogers placed his left hand upon Ajlouny's

left hand on the steering wheel. In response to Rogers' inquiry concerning a weapon, Ajlouny indicated that he had a gun on his left side. Rogers recovered the gun and began to move Ajlouny out of the car.

Simultaneously, the other officers and agents moved around the car. Agent Mulcahy went along the passenger side toward the front of the car. Agent Woodworth moved toward the front door on the passenger side. As the activity between Rogers and Ajlouny continued, Woodworth, upon his arrival, opened the passenger door, leaned into the car and began to search in and around the front seat for weapons. A leather briefcase was in the middle of the front seat. Woodworth lifted the cover of the briefcase, and noticed wires, "filament from a telephone" (Tr.172)and a calculator-type object in a small leather

case. He did not find a weapon. His actions were contemporaneous with Ajlouny's movement out of the car.[11]

Immediately after searching the front Woodworth exited the car and asked one of the agents if the gun was recovered. He then conversed with a state police officer at the scene who did not participate in the arrest or weapons search.[12] The officer inquired as to the existence of a blue box, and described it. Woodworth indicated that based on his examination of the calculator case[13] and wires he believed the briefcase contained such a device. The blue box was then seized by the state officer.

Both Ajlouny and the Government concede that the validity of the search and seizure must be judged according to the standards enunciated in Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.

2d 685 (1969) for a search incident to the arrest. Under Chimel, an officer is justified in making a contemporaneous search for a weapon in order to protest his person. That search may encompass not only the body of the arrested person but also the grabbable area within the immediate control of the arrested person. Id. at 762-3,89 S.Ct. 2034. It is equally well settled that a "search can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest." Stoner v. California, 376 U.S. 483, 486, 84 S.Ct. 889, 891, 11 L.Ed.2d 856 (1964). See also Shipley v. California, 395 U.S. 818, 89 S.Ct. 2053, 23 L.Ed.2d 732(1969).

Given the facts established at the hearing, it is clear that the search of the briefcase was incident to the arrest.

Woodworth's actions occurred at the same time as Ajlouny's motion up from and out of the car. Ajlouny was restrained by Rogers' left hand only, leaving Ajlouny's right hand free within a few feet of the briefcase on the front seat. Thus, Ajlouny, a man of physical characteristics commensurate with those of Rogers, was not so restrained that the area within the front seat of the car was outside his effective control.[14] See, e.g., United States v. Regan, 525 F.2d 1151, 1155 n.3 (2d Cir. 1975)(heroin found in motorcycle helmet on front seat of car). Moreover, the court is satisfied that Ajlouny was handcuffed only after he was removed from the immediate area of the front seat, and brought to the front of the car, and therefore was capable of reaching into the car while sitting in the seat and standing with Rogers. See, e.g. United

States v. Mason, 173 U.App.D.C. 173, 523 F.2d 1122 (D.C.Cir. 1975) (handcuffed man capable of reaching weapon three to four feet away in a closet). The court is also satisfied that the briefcase was unlatched at the time Woodworth conducted his search,[15] and was therefore a proper object for a search. See also United States v. Fairfield, 526 F.2d 8 (8th Cir. 1975) (search of car for weapons after defendant's arrest outside of car). The briefcase was not within the exclusive control of the officers at the time of the search. Compare United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977). Finally, the fact that the weapons search revealed a blue box that gave rise to probable cause for its seizure for another crime, is not a basis for suppressing the seized item. United States v. Robinson, 414 U.S. 218, 94 S.Ct.

467, 38 L.Ed.2d 427 (1973). Accordingly, the blue box was properly seized incident to Ajlouny's arrest, and the motion to suppress must be denied.[16]

VII. SEARCH OF DEFENDANT'S HOME

Ajlouny summarily argues that the fruits of the search of his home and business must be suppressed because he did not voluntarily consent to the search.[17] The court finds that Ajlouny voluntarily and knowingly consented to the searches subsequent to his arrest. The testimony at the hearing satisfied the court that Ajlouny was properly informed of his constitutional rights and volunteered information and cooperated with the agents. Moreover, there is no indication that the agents induced that cooperation by threats or promises. Accordingly, the contention is without substance and the motion is denied.

VIII. POST-ARREST STATEMENTS

Ajlouny's final contention concerns statements made to an Assistant United States Attorney (AUSA) after arrest but before arraignment by a United States Magistrate. Ajlouny contends that the period of time between arrest and arraignment constituted unnecessary delay under 18 U.S.C. § 3501 and Fed.R.Crim.P. 5(a) requiring the suppression of any statements made by him to the AUSA. The government rejects Ajlouny's rendition of the facts and argues that the delay between arrest and arraignment was reasonable and justified.

The question before the court is whether the statements were made under circumstances which would indicate that Ajlouny's will to resist was broken by a delay of approximately seven hours. See United States v. Reed, 572 F.2d 412, 426

(2d Cir. 1978). Under 18 U.S.C. § 3501(b) several factors are listed to guide the court in its determination of voluntariness. These factors include the amount of time which elapsed, the defendant's knowledge of the charges, the defendant's awareness of his right to remain silent and of his right to counsel, and the presence or absence of an attorney. 18 U.S.C. § 3501(b).

Here, the focus of the inquiry centers around the amount of time which elapsed between the arrest and arraignment, and the manner in which that time elapsed. Ajlouny was arrested at approximately 8:00 a.m.[18] and arraigned at approximately 3:30 p.m. of that day, a maximum period of seven and one-half hours. The arrest period took approximately five to ten minutes before the defendant was placed in the car and driven from his home. During that time the defendant was in-

formed of his right to remain silent, of his right to an attorney and of the right of the Government to use any statements made by him. Ajlouny was placed in the government vehicle and brought to a McDonald's restaurant, and offered coffee and breakfast. During the time at McDonald's, Ajlouny and the agents engaged in a conversation and Ajlouny was informed of the nature of the charges against him. During that time, Ajlouny consented to a search of his premises. Ajlouny thereupon executed a written consent to a search of his home and business. The agents and Ajlouny returned to Ajlouny's home. A search of the Ajlouny home and business ensued. The elapsed time between the arrest and the second departure was approximately three hours. One hour was spent at the McDonald's restaurant.

The party left the Ajlouny home for the World Trade Center at approximately 11:30 a.m. The trip from Hempstead on Long Island to the World Trade Center in lower Manhattan took until approximately 12:30 p.m. At the World Trade Center offices of the Customs agents, Ajlouny was processed routinely and offered lunch. During this period at the World Trade Center Ajlouny discussed his PLO affiliation and relationship to the Middle East.

After processing at the World Trade Center Ajlouny was transported to the federal courthouse in Brooklyn for arraignment. He arrived with the agents at approximately 1:40 p.m. Upon arrival, he was first taken to AUSA Mansfield's office and introduced to AUSA Mansfield. Shortly thereafter, Mansfield informed Ajlouny of his constitutional rights and conducted an interview for approximately 20 minutes

concerning the charges against Ajlouny. Ajlouny was then brought to the United States Marshal's office in the courthouse building for further routine processing. No further questioning of Ajlouny occurred after that time concerning the charges. Ajlouny was arraigned before a Magistrate at 3:30 p.m., approximately one and one half hours after the Manfield interview. This additional time between the interview and arraignment was largely a result of the processing by the Marshal, and a delay because of courtroom conditions before the Magistrate.

Given these facts, the court finds that Ajlouny voluntarily cooperated with both the agents and AUSA Mansfield. It is clear that he was sufficiently apprised of his constitutional rights at crucial points during this period and he indicated his understanding of those rights. There is

no indication that the agents subjected him to coercive or dilatory tactics solely to elicit incriminating statements. Rather, the facts before the court indicate that Ajlouny was treated in a courteous manner by the agents. The mere fact that Ajlouny was willing to aid the officers in their investigation is not a basis for finding unnecessary delay, especially in light of Ajlouny's knowledgeable consent. See e.g. United States v. Vita, 294 F.2d 524 (2d Cir. 1961), cert. denied, 369 U.S. 823, 82 S.Ct. 837, 7 L.Ed.2d 788 (1962). Furthermore, the need for transportation and processing was a reasonable justification for the time spent in those activities. Thus, given the circumstances of the case, the court is satisfied that the time between arrest and arraignment was not a period of unreasonable delay which caused the defen-

dant to make involuntary incriminating statements. See United States v. Shoemaker, 542 F.2d 561 (10th Cir. 1976)(13 hours delay not unreasonable under circumstances); United States v. Ortega, 471 F.2d 1350(2d Cir. 1972)(11 hour delay not unreasonable); United States v. Collins, 462 F.2d 792(2d Cir. 1972)(26 hour delay not unreasonable); United States v. Marrero, 450 F.2d 373 (2d Cir. 1971) (more than 6 hours not per se unreasonable).[19] Accordingly, the motion to suppress the statements made to AUSA Mansfield is denied.

CONCLUSION

The court finds that the contentions raised by the defendant are not supported by the facts and law of this case. Accordingly, the numerous motions raised by him must be denied.

FOOTNOTES

1. At a preliminary stage in the proceedings, Judge Platt also determined that the PLO "connection" was relevant to the Grand Jury's inquiry.

2. During the course of its inquiry the Government advised the court that statements attributed to Mr. Ajlouny were recorded during the course of national security electronic surveillance. Ajlouny sought the disclosure and suppression of the recorded statements. The court reviewed the records of the surveillances in camera, and finds that the statements do not concern the subject matter of the indictment, and were not used to initiate the investigation concerning the crimes charged. Moreover, the court finds that there was an independent basis for the investigation of Ajlouny and the subsequent arrest.

The court is also satisfied that the in camera procedure used here was proper under the circumstances. The surveillance in this case was lawful, having been ordered and approved by the Attorney General to monitor what the court finds were persons, agencies and matters involving foreign intelligence of legitimate concern to the national security. See Alderman v. United States, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969) (production required for illegal surveillance); United States v. Buck, 548 F.2d 871 (9th Cir. 1977); United States v. Butenko, 494 F.2d 593 (3rd Cir. 1974), cert. denied, 419 U.S. 881, 95 S.Ct. 147, 42 L.Ed. 2d 121 (1974); United States v. Brown, 484 F.2d 418 (5th Cir. 1973),

cert. denied, 415 U.S. 960, 94 S.Ct. 1490, 39 L.Ed. 2d 575 (1973).

Since the court finds that the statements were lawfully recorded during the course of legitimate national security electronic surveillance, there is no basis for disclosing and suppressing the statements. See 18 U.S.C. §2511(3).

3. Employees of the New York Telephone Company installed a pen register device to record the numbers of the calls made by Ajlouny. Any challenge to the validity of the pen register is precluded by Smith v. Maryland, -- U.S. --, 99 S.Ct. 2577, 61 L.Ed. 2d 220 (1979).

4. Ajlouny relies primarily on United States v. Halper, 590 F.2d 422 (2d Cir. 1978) to support his position. Although Halper presents an excellent discourse on the law of joinder, the facts in that case distinguish it from the case presented to the court.

5. On April 17, 1978 Agent Rogers' suspicion was apparently further aroused by the fact that the shipping documents indicated that Ajlouny was shipping air conditioning equipment. Rogers knew that Ajlouny worked for a professional cleaning corporation and had no known relationship with air conditioners.

6. The brief was submitted to this court during oral argument.

7. The remaining citations must be construed as standing for the proposition

that Congress may specifically regulate export searches and establish standards for enforcement. Thus, in California Bankers Ass'n v. Shultz, 416 U.S. 21, 94 S.Ct. 1494, 39 L.Ed.2d 812 (1978), the court approved regulations, concerning foreign banking transactions. Moreover, 22 U.S.C. §401(a) authorizes the seizure of munitions and war materials exported without a license. There, Congress required a showing of probably cause to justify the search and seizure. Similarly, Samora v. United States, 406 F.2d 1095 (5th Cir. 1969) involved a seizure under 22 U.S.C. §401(a) after a finding of probable cause.

Ajlouny has stressed the significance of this melange of cases cited by the court. While there is some merit to his argument concerning those citations which were based on probable cause, the discussion of Chabot and Stanley, supra will indicate the impact of those cases on the determination here.

8. Simply explained, a blue box is an electronic device used to bypass ordinary telephonic payment recording procedures. It is clipped to a telephone and enables the user to avoid charges for the telephone calls made. See 34 A.L.R. Fed. 278.

9. Ajlouny does not contend, for these purposes, that the arrest was made without probably cause, although such an argument would flow from the suppression of the contents of the container. Having found that the items in the container were lawfully seized, this

court has a sufficient basis for a finding of probable cause to make the arrest. Here, once the agents were informed that the communications equipment found in the container was stolen, they had probable cause to arrest Ajlouny.

10. The state police officers were present as a result of their investigation into Ajlouny's use of a blue box.

11. Woodworth's actions consumed approximately thirty seconds to one minute. Roger's initial movement with Ajlouny out of the car lasted slightly less than one minute.

12. This conversation occurred less than a minute after Woodworth's exit.

13. Woodworth picked up the case and handled it for a few seconds, satisfied that it did not contain a weapon, he returned it to the position in the case.

14. It may be noted that the car, a Cadillac, would most likely have allowed relatively easy access to the front seat.

15. Ajlouny testified that he left his house with the briefcase latched, and did not unlatch it after entering the car. However, Woodworth indicated that he did not unlatch the briefcase and only lifted the top. He stated that he handled the calculator case for a few seconds. O'Donnell indicated that the case was propped open by papers jammed around the edges of the case.

Given this discrepancy, the court is faced with a clear issue of credibility, and is satisfied that the case was unlatched on the front seat of the car. Similarly, the issue as to whether the passenger door was unlocked is resolved affirmatively.

16. Ajlouny also contended that the customs officers had no authority to make the arrest. The court finds that the arrest was proper. See 26 U.S.C. §7607(1); United States v. Swarovski, 557 F.2d 40 (2d Cir. 1977).

Ajlouny also questions the validity of the arrest warrant. He claims that Rogers' complaint was made in bad faith and contained intentional misrepresentations of material facts. The court finds that Rogers acted in good faith in making the complaint. When the telephone equipment was found in the container, the Telephone Company was contacted concerning the equipment. The information received from the representatives of the Telephone Company was a sufficient, good faith basis for Rogers' affidavit.

17. The Government concedes that Ajlouny did not consent to a search of his bedroom and will not offer any evidence seized from the bedroom.

18. While the agents indicated that the arrest took place between 8:00 a.m. and 8:15 a.m., Mr. and Mrs. Ajlouny stated that the arrest occurred between 8:30 a.m. and 8:45 a.m.

19. The defendant based his argument partially on the concurring opinion of Judge Friendly in Marrero concerning the interrogation by an AUSA. (Tr. 540, Direct Examination of Mansfield). However, in United States v. Ortega, supra, Judge Medina expressed his disagreement with Judge Friendly's view of the law. 471 F.2d at 162.

APPENDIX C

Transcript of Lower Court Proceedings

THE COURT: I have come to a conclusion. After reviewing it myself during the lunch hour and reviewing both statutes, the 659 and 2314 under which the defendant was indicted, I find since most of the law -- as a matter of fact, all of the law with the exception of the case that you recited to the Court involves 659 but the provision of the statutes are rather similar. Particularly involving interstate and foreign commerce, and particularly since the definitions would refer to foreign commerce as set forth in 2314, and also being a jurisdictional question involved, this Court finds it will accept the opinions that have been set forth in 659 as to the same provisions in 2314 and, therefore, denies the motion, that the area of the customs area for all inten-

tions and purposes can be deemed an area where the goods were in foreign commerce.

MR. NELSON: Thank you.

MR. WING: Respectfully except.

APPENDIX D

Judgment of Affirmance by United States Court of Appeals

For the Second Circuit

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-ninth day of August one thousand nine hundred and eighty

Present:

Hon. Sterry R. Waterman

Hon. William H. Timbers

Hon. Jon O. Newman

Circuit Judges,

UNITED STTAES OF AMERICA

Appellee,

V.

PAUL AJLOUNY,

Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, is it now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court.

A. Daniel Fusaro
Clerk

By Arthur Heller
Deputy Clerk

APPENDIX E

CONSTITUTIONAL PROVISIONS AND STATUTES

AMENDMENT IV, UNITED STATES CONSTITUTION

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Title 18, UNITED STATES CODE

"§ 2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same

to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

APPENDIX E - CONSTITUTIONAL PROVISIONS AND STATUTES

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate commerce any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United

APPENDIX E - CONSTITUTIONAL PROVISIONS AND STATUTES

States, or of an obligation, bond certificate, security, treasury not, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country."

No. 80-622

In the Supreme Court of the United States

OCTOBER TERM, 1980

PAUL AJLOUNY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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PAUL AJLOUNY, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether petitioner's Fourth Amendment rights were violated when he was overheard in the course of warrantless electronic surveillance for foreign intelligence, and whether the fruits of that surveillance were improperly admitted into evidence at trial.

2. Whether the "border search" exception to the warrant requirement applies only to searches of imported items.

3. Whether stolen goods that were delivered by petitioner to a loading dock for shipment to a foreign country, but were seized before they left the United States, were in "foreign commerce" within the meaning of 18 U.S.C. 2314.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 629 F.2d 830. The opinion of the district court (Pet. App. 27a-75a) is reported at 476 F. Supp. 995.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1980 (Pet. App. 78a-79a). The petition for a writ of certiorari was filed on October 16, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. 2314 provides in pertinent part:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud * * *
>
> * * * * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of transporting stolen goods in foreign commerce, in violation of 18 U.S.C. 2314.[1] He was sentenced to two years' imprisonment and was fined $10,000. The court of appeals affirmed (Pet. App. 1a-26a).

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[1] The jury was unable to reach a verdict on an additional 136 counts of wire fraud (18 U.S.C. 1343).

The evidence showed that in March 1978, investigators for the New York Telephone Company alerted Customs agents that petitioner had made several "blue box" telephone calls to the Middle East (Pet. App. 3a).[2] The investigators also said that petitioner had attempted to stop the telephone company's investigation by warning that it was endangering the lives of persons in the United States and Israel (*ibid.*). Customs agents later learned that some of the blue box calls placed from petitioner's residence were made to Palestine Liberation Organization (PLO) headquarters in Beirut, Lebanon (*ibid.*).

On April 8, 1978, in the course of surveillance to determine whether petitioner was making blue box calls from telephone booths near his home, Customs agents followed petitioner to a nearby shopping center. There they saw him supervising the loading of a large cargo container (Pet. App. 3a; Tr. 776-778). The agents learned that the container was leased by petitioner and was scheduled for shipment to Qatar on April 17 (Pet. App. 3a).

On that date, the agents located the cargo container in the customs control area of a Brooklyn pier (Pet. App. 3a). The dock receipt stated that the container held air conditioning equipment (*ibid.*). Knowing that petitioner worked for a cleaning firm that had no connection with air conditioners, and that petitioner was affiliated with the PLO, the agents opened the container (*id.* at 3a-4a & n.2, 71a

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[2] A "blue box" is a device that allows long-distance telephone calls to be made without charge to the maker. The blue box simulates the tones and sounds used by the telephone company and enables the user to make the calls without generating any records (Pet. App. 2a).

n.5).[3] Inside was a variety of sophisticated teletype and telecommunications equipment, but no air conditioners. Telephone company investigators identified some of the equipment as stolen property (*id.* at 4a).

ARGUMENT

1. Petitioner contends (Pet. 14-34) that his Fourth Amendment rights were violated by warrantless electronic surveillance, and that the courts below erred in refusing to suppress the fruits of that surveillance.[4] For a variety of reasons, this claim is without merit.

To begin with, there was no violation of petitioner's constitutional rights. While this Court has not decided the question whether the President, without prior judicial approval, may authorize electronic surveillance to gather foreign intelligence in the service of national security (see *United States* v. *United*

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[3] The agents also knew that petitioner was licensed to carry a gun and had previously attempted to import three guns into New York (Pet. App. 4a n.2).

[4] We note that, while petitioner was the subject of electronic surveillance, neither the prosecutors nor defense counsel had access to the tapes of the intercepted conversations. Thus, the record in this case is barren of any information concerning the location at which petitioner's conversations were monitored, the parties to those conversations and the contents of the conversations. Prior to trial, the government submitted to the district court sealed packages containing recordings of the intercepted conversations. These recordings were reviewed *in camera* by the district court and the court of appeals. Both courts found that the conversations were lawfully intercepted in the course of legitimate foreign intelligence surveillance (Pet. App. 18a, 70a-71a n.2). In addition, the district court found that the criminal investigation and prosecution of petitioner were not the fruits of the electronic surveillance (*id.* at 70a n.2).

States District Court, 407 U.S. 297, 308-309, 321-322 (1972)), every appellate court that has confronted the issue directly has concluded that the Constitution permits the President to exercise this authority. See *United States* v. *Butenko*, 494 F.2d 593, 605 (3d Cir.) (en banc), cert. denied, 419 U.S. 881 (1974); *United States* v. *Truong Dinh Hung*, 629 F.2d 908, 913-914 (4th Cir. 1980); *United States* v. *Brown*, 484 F.2d 418, 426 (5th Cir. 1973), cert. denied, 415 U.S. 960 (1974); *United States* v. *Buck*, 548 F.2d 871, 875 (9th Cir.), cert. denied, 434 U.S. 890 (1977); but see *Zweibon* v. *Mitchell*, 516 F.2d 594, 651 (D.C. Cir. 1975) (en banc; plurality opinion), cert. denied, 425 U.S. 944 (1976) (dictum).[5] As the Fourth Circuit recently observed in *United States* v. *Truong Dinh Hung*, *supra*, there are several compelling considerations that militate against imposition of a uniform warrant requirement for foreign intelligence surveillances (629 F.2d at 913-914; footnote omitted):

> First of all, attempts to counter foreign threats to the national security require the utmost stealth, speed, and secrecy. A warrant requirement would add a procedural hurdle that would reduce the flexibility of executive foreign intelligence initiatives, in some cases delay executive response to foreign intelligence threats, and increase the chance of leaks regarding sensitive executive operations. * * *

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[5] *Zweibon*, unlike the present case, involved electronic surveillance of members of a domestic organization whose actions had an effect on foreign relations, but who acted neither as agents of nor collaborators with a foreign power. 516 F.2d at 651.

> More importantly, the executive possesses unparalleled expertise to make the decision whether to conduct foreign intelligence surveillance, whereas the judiciary is largely inexperienced in making the delicate and complex decisions that lie behind foreign intelligence surveillance. * * *
>
> Perhaps most crucially, the executive branch not only has superior expertise in the area of foreign intelligence, it is also constitutionally designated as the pre-eminent authority in foreign affairs. * * *
>
> In sum, because of the need of the executive branch for flexibility, its practical experience, and its constitutional competence, the courts should not require the executive to secure a warrant each time it conducts foreign intelligence surveillance. * * *

After an *in camera* review of the wiretap records, the district court concluded that petitioner's conversations were intercepted in the course of foreign intelligence surveillance of legitimate concern to the national security (Pet. App. 70a-71a n.2). The court of appeals, after a similar review of the same materials, agreed with the district court's assessment "that this was a foreign intelligence surveillance, justifiably and reasonably conducted" (*id.* at 18a). Thus, the surveillance, which was for legitimate foreign intelligence purposes, did not violate the Fourth Amendment because it was conducted without prior judicial authorization.

In any event, as the court of appeals correctly concluded (Pet. App. 18a-23a), it would be inappropriate to apply the exclusionary rule in this case, even assuming that petitioner's rights had been violated by the surveillance and that the violations had produced

evidence used at trial.[6] The primary, if not the exclusive, justification for the exclusionary rule is the deterrence of illegal police conduct. *Stone* v. *Powell*, 428 U.S. 465, 485-486 (1976).[7] But the national security surveillance here was not undertaken in the service of any purpose ordinarily identified with the police or with criminal law enforcement generally; accordingly, suppression would not have been an effective deterrent. Moreover, unlike the typical case in which an excessive official intrusion results from misjudgment or overzealousness of an officer in the field (see, *e.g.*, *Delaware* v. *Prouse*, 440 U.S. 648, 661 (1979)), the intrusion in this case was (Pet. App. 14a):

> * * * authorized by the Attorney General pursuant to the power delegated to him by the President of the United States in the exercise of his authority relating to the Nation's foreign affairs as described in 18 U.S.C. § 2511(3), to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain counterintelligence (including foreign) information deemed essential to the security of the United States, and to protect national secur-

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[6] As noted earlier (see note 4, *supra*), the district court found that the intercepted conversations did "not concern the subject matter of the indictment, and were not used to initiate the investigation concerning the crimes charged" (Pet. App. 70a n.2).

[7] Although the exclusionary rule has also been described as protecting the integrity of the judicial process from the taint of illegally seized evidence, the Court's decisions demonstrate that this justification plays only a limited role in determining whether to apply the exclusionary rule in a particular context. *Stone* v. *Powell*, *supra*, 428 U.S. at 485.

ity information against foreign intelligence activities.

It is unlikely that officials conducting surveillance to gather information "essential to the security of the United States," and acting at the essential direction of the President, will be—or ought to be—deterred in their operations by the prospect that incidental discoveries will not be usable at a criminal trial.

In addition, even assuming that the exclusionary rule's deterrent purpose is relevant here, "evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *United States* v. *Peltier*, 422 U.S. 531, 542 (1975). Because the prevailing view of the federal courts at the time of the interceptions was that no warrant was required to conduct foreign intelligence surveillance (see cases cited at page 4, *supra*), the agents could reasonably have believed that their conduct was not unlawful. Thus, even if petitioner's rights were violated by the surveillance, nothing in the Fourth Amendment or the exclusionary rule requires suppression of the fruits of that surveillance. See *United States* v. *Peltier*, *supra*, 422 U.S. at 542; *United States* v. *Williams*, 622 F.2d 830, 840-847 (5th Cir. 1980) (en banc), petition for cert. pending, No. 80-5613.

Finally, and perhaps most importantly, this question does not merit review because it is of limited practical significance in light of Congress' enactment of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. (Supp. III) 1801-1811. This Act, which was adopted with the support of the Executive Branch (see H.R. Rep. No. 95-1283, 95th Cong., 2d Sess. 13-

14 (1978)), requires prior judicial authorization for foreign intelligence electronic surveillance, while simultaneously protecting the President's need to act swiftly and secretly.[8] The warrant requirement imposed by the Act will, presumably, reduce or eliminate altogether future instances of warrantless national security electronic surveillance. Accordingly, there is no occasion for the Court to decide now whether the Constitution independently imposes a warrant requirement for surveillance of this character. As the court of appeals accurately noted (Pet. App. 23a), "[t]hough the exclusionary rule remains

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[8] Sections 102(a)(3) and 103(c) of the Act, 50 U.S.C. (Supp. III), 1802(a)(3) and 1803(c), safeguard the overriding needs of secrecy by providing that the warrant applications shall be maintained under security measures established by the Chief Justice in consultation with the Attorney General and the Director of Central Intelligence. Disclosure of applications is strictly limited by Section 106(f), 50 U.S.C. (Supp. III), 1806(f). The President is assured that his application for a warrant or an appeal from its denial will not encumber his authority to gather necessary intelligence information with dispatch. Section 105(e), 50 U.S.C. (Supp. III) 1805(e), permits the use of electronic surveillance without a warrant for up to 24 hours in emergencies, and Section 103 requires the courts to expedite their review of warrant applications. The Act allows an initial surveillance of up to 90 days (and of up to one year where the target is a foreign power), with extensions for one year (Section 105(d)(1)(2)). Only seven judges, appointed by the Chief Justice, are empowered to pass on government applications, and review of their decision is confined to a specially-designated panel of three judges and to this Court on an expedited certiorari procedure (Section 103). The Act does not require that an application for a warrant make out probable cause in the traditional sense; rather, it confides to the exclusive discretion of the President and designated officials in the Executive Branch the decision that the information sought is foreign intelligence information and that the electronic surveillance is needed (Section 105).

available in the event the new statutory requirements are not observed, there is little if any need to apply the rule to a possible Fourth Amendment violation now that agents' conduct in the future will normally be guided and measured by statutory standards."

2. Petitioner next argues (Pet. 35-47) that the "border search" exception should not apply to export searches and that therefore the search of the cargo container was improper because it was conducted without a warrant and without probable cause. This claim is also without merit.

As the court below recognized (Pet. App. 7a), application of the border search doctrine depends not upon the direction in which goods are travelling, but rather upon a nexus between goods and the border. See *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 63 (1974) ("[T]hose entering and leaving the country may be examined as to their belongings and effects, all without violating the Fourth Amendment * * * "); *United States* v. *Swarovski*, 592 F.2d 131, 133 (2d Cir. 1979); *United States* v. *Stanley*, 545 F.2d 661, 665-667 (9th Cir. 1976), cert. denied, 436 U.S. 917 (1978); *Samora* v. *United States*, 406 F.2d 1095, 1098-1099 (5th Cir. 1969).

While the border exception has commonly been applied in the context of searches conducted upon entry into this country, rather than upon departure, there is no reason to devise different rules to govern exit border searches. The governmental interest in preventing illicit international drug trafficking and other forms of smuggling is not restricted to controlling incoming contraband. Indeed, the Controlled Substances Import and Export Act criminalizes exportation as well as importation of illegal drugs. 21 U.S.C. 953. While illicit drug trafficking may more

commonly involve importation into rather than exportation from the United States, the opposite is true with respect to other commonly smuggled goods, such as firearms. See *United States* v. *Gonzalez-Rodriguez*, 513 F.2d 928 (9th Cir. 1975); *Samora* v. *United States*, *supra*. Moreover, the cooperation of foreign nations in controlling the traffic in illicit drugs is dependent in part on this country's efforts to control the export of drugs and other contraband.[9]

Here, the container that was searched "was located on a pier, within a customs area, and marked for shipment abroad" (Pet. App. 7a). Accordingly, the search was a valid border search and was "reasonable" even in the absence of a warrant and probable

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[9] Contrary to petitioner's contention (Pet. 35), the decision below does not conflict "with numerous decisions of this Court * * *." In fact, this Court has never held that the "border search" exception applies only to imported items. The decisions from other courts upon which petitioner relies (Pet. 40-42) also do not conflict with the court of appeals' decision here. *Corngold* v. *United States*, 367 F.2d 1 (9th Cir. 1966), involved a search of packages that were being shipped from Los Angeles to New York. The cases of *United States* v. *Marti*, 321 F. Supp. 59 (E.D.N.Y. 1970), and *People* v. *Esposito*, 37 N.Y.2d 156, 332 N.E.2d 863, 371 N.Y.S.2d 681 (1975), involved the construction of statutes not at issue in this case. Petitioner's reliance (Pet. 42) on 22 U.S.C. 401(a) is similarly misplaced. This statute imposes a probable cause requirement for *seizures* of arms sought to be exported in violation of law. As the court below explained (Pet. App. 10a; footnote omitted), "[t]hese provisions were primarily designed to protect innocent owners and claimants from the inconvenience and expense associated with unwarranted seizure and detention of their property. * * * There is no indication, however, that the law was also intended to protect persons against the less serious interference with property rights associated with a customs search."

cause. See *United States* v. *Ramsey*, 431 U.S. 606, 619 (1977). Moreover, the search was conducted in a reasonable manner and, as the district court found (Pet. App. 51a-52a), was based upon reasonable suspicion. Accordingly, the courts below properly denied petitioner's motion to suppress the stolen equipment found in the search of the cargo container.

3. The evidence showed that the cargo container was placed in a restricted dockside customs area and was handed over to a shipping company three days before the search (Tr. 781-782). The shipper had actual possession of the container; only the Customs agents' intervention prevented the equipment from being loaded aboard ship and reaching its intended foreign destination. Petitioner claims (Pet. 48-58), however, that the evidence failed to show interstate or foreign transportation of the stolen items, as required by 18 U.S.C. 2314, because there was no actual border crossing.

Petitioner's argument flies in the face of common sense and the legislative intent of Section 2314. To construe the statute in the way petitioner proposes would lead to the absurd result that, after discovering stolen property about to be shipped to a foreign destination, customs agents must permit the property to be loaded onto the ship, escort the ship to the international boundary line,[10] and wait until the ship's hull crosses the line before ordering the ship back to port so that the stolen cargo may be seized to form the basis for a prosecution under the statute. The court of appeals correctly concluded (Pet. App. 13a) that "Congress was not aiming only at stolen goods

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[10] The international maritime border is located a distance of three miles from the coast. See *Cunard Steamship Co.* v. *Mellon*, 262 U.S. 100, 122 (1923).

moving across a technical boundary line, but also wanted to reach shipments in the course of such a crossing, including at least goods at a dockside customs area." In construing statutory language similar to that used in Section 2314, the courts consistently have held that no border crossing is required where, as here, the shipment has been placed in the hands of a carrier destined for a different state or country (see cases cited at Pet. App. 13a (construing 18 U.S.C. 659)).[11] Petitioner's claim that Section 2314 grew from a uniquely narrow legislative purpose is wrong. The legislative histories of Sections 2314 and 659 show that in enacting each of these statutes Congress was concerned with the problem of felons evading state prosecution by using the facilities of interstate and foreign commerce. See 49 Cong. Rec. 1781 (1913) (remarks of Sen. Cummins); 78 Cong. Rec. 2947 (1934) (letter of Attorney General Cummings).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[11] As the court below noted (Pet. App. 12a n.9), none of the cases on which petitioner relies involved the question whether Section 2314 "reaches items at a border imminently to be transported across it."

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